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IN THE

Supreme Court of the United States
OCTOBER TERM, 1988

ALEXIA ANDERSON, *et al.*,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED*

1. May a federal district court certify a nationwide, mandatory, non-opt out class under Rule 23(b)(1) of the Federal Rules of Civil Procedure, consisting of approximately 195,000 tort victims who have individual claims for damages against a financially responsible defendant?

2. If Rule 23(b)(1) permits such certification, is the certification nonetheless invalid under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), because those victims who object to having their claims for damages adjudicated on a classwide basis, in a district with which they have no connection whatsoever, by counsel not of their own choosing, with no opportunity to opt out, would be deprived of a property right without due process of law?

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*In addition to the named petitioner Alexia Anderson, the other petitioners include the other 528 individuals who are listed at the conclusion to the opinion of the court of appeals, Pet. App. 92a—132a, with a bold line along side their names, all of whom were appellants in that court. In addition to the respondent Aetna Casualty and Surety Company, which was the sole defendant in the district court, Glenda Breland, Sherry Gaskins, Helen Quinn, Maria Martinez, Cheryl Zuniga, Gayle Ayon, and Judith Deptula were plaintiffs and class representatives in the district court, and they and Aetna were appellees in the court of appeals. Although the opinion in the court of appeals is captioned "In Re A.H. Robins Company, Incorporated," Robins was not a party in either the district court or court of appeals and is, therefore, not a respondent in this Court. Because its attorneys entered an appearence in the court of appeals, as did the attorneys for the law firm McGuire, Woods, Battle, & Boothe, copies of this petition and the appendix are being served on those attorneys.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 880 F.2d 709 and appears in the separately bound appendix at 1a-91a. The decision of the United States District Court for the Eastern District of Virginia conditionally granting class certification is not reported and appears at 134a-135a. The district court's memorandum of April 12, 1988, approving class certification, is reported at 85 B.R. 373 and appears in the appendix at 138a-157a. The unreported order of that date granting class certification appears at 136a-137a. The memorandum of the district court dated July 26, 1988, approving the class action settlement, is reported at 88 B.R. 755 and is set forth at 160a-177a. The unreported order entered pursuant to that memorandum is set forth at 178a-180a.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1989. 181a-183a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE AT ISSUE

The Due Process Clause of the Fifth Amendment to the Constitution provides in pertinent part that "No person shall . . . be deprived of . . . property, without due process of law."

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> >
> > > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> >
> > * * * *
> >
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual

members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

The principal question presented on this petition is whether the district court properly certified a mandatory, nationwide class under Rule 23(b)(1) of the Federal Rules of Civil Procedure, consisting of all Dalkon Shield victims who filed timely claims in the A.H. Robins Company Inc. ("Robins") reorganization proceeding, without providing those victims the right to opt out. If the answer to that question is yes, then the Court must consider whether that certification order violates the due process rights of unnamed class members. In the court of appeals petitioners also challenged the validity of the district court's approval of the settlement of this class action, but in this Court they seek only to overturn the rulings precluding them from opting out and proceeding on their own against the respondent Aetna Casualty and Surety Company ("Aetna"), which is the sole defendant in this action. In order to explain the rulings below, it is first necessary to describe the background of this case, including the prior litigation against Robins.[1]

[1]The district court actually certified two classes, one for those who filed timely claims in the Robins reorganization proceeding and the other for those who did not. Since the vast majority of petitioners filed on time, this petition will not discuss the validity of those provisions relating to those who were not timely. In addition, the class certification affected not only United States residents, but those claimants who reside in the more than

(footnote continued)

1. *Facts*

Beginning in 1970, the A.H. Robins Company, a Richmond Virginia corporation which is not a party to this litigation, began selling the Dalkon Shield intrauterine contraceptive device, and, almost immediately, adverse reactions and serious injuries developed. Robins continued to market the product in the United States until June 1974, but it did not recall the devices still in use until the fall of 1984. Respondent Aetna was Robins' product liability insurer for the Dalkon Shield throughout this period, and it provided for the costs of defense and the payment of judgments and settlements in accordance with the terms of its insurance policy.

In February 1975, a Kansas state court jury awarded a Dalkon Shield plaintiff $85,000 against Robins, including $75,000 in punitive damages. Thereafter, suits were filed in increasing numbers, and verdicts were rendered, generally in favor of the plaintiffs, with a significant number providing for substantial compensatory and punitive damages. As a result, in August 1985, with approximately 6,000 Dalkon Shield cases then pending, Robins sought protection under Chapter 11 of the Bankruptcy Code, thereby obtaining an automatic stay of all litigation against it.

In the meantime, suits had been filed against Aetna alleging that it, too, was responsible for the damages to Dalkon Shield victims. None of those cases went to trial, but a number were dismissed on various grounds, including failure to state a claim because the courts found that Aetna, as an insurer, had no affirmative duty to warn the public or to facilitate a recall of a product for which it was providing insurance.

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100 foreign countries in which the Dalkon Shield was sold. Although some of the petitioners are not U.S. residents, and although the worldwide nature of the class certification magnifies the due process difficulties in the certification order, that feature also will not be discussed further because petitioners believe that the creation of a nationwide class presents such insurmountable barriers that, even on that basis, the decision below cannot be sustained.

This case was filed by the respondent Glenda Breland and the other six individual respondents in the United States District Court for the District of Minnesota on April 9, 1986. The complaint alleged subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332, and several other statutes. None of the seven plaintiffs was a Minnesota resident, although their counsel were located there. Aetna was not a Minnesota corporation or headquartered there, and two of the three other individuals who were named as defendants in the original complaint, but later dismissed by plaintiffs — E. Claiborne Robins, and E. Claiborne Robins, Jr., — were citizens of Virginia, where Robins manufactured the Dalkon Shield and from which it directed the defense of the litigation against it.[2] The Minnesota District Court *sua sponte* transferred the case to the Eastern District of Virginia on April 28, 1986, where the Robins bankruptcy proceeding was being conducted. On September 23, 1986, the Breland plaintiffs filed a third amended complaint, naming only Aetna as a defendant, but listing the other original defendants as co-conspirators. This document then became the operative pleading for class certification and settlement purposes.

Under a variety of labels, the Breland plaintiffs alleged that Aetna was jointly liable with Robins and other coconspirators for all the injuries suffered by all Dalkon Shield victims, generally under a theory of joint enterprise or conspiracy, in which Aetna was alleged to have participated since the first device was sold. Despite these broad allegations of joint responsibility, the complaint identified certain events that suggested that Aetna's liability was not constant throughout the years 1970-1984, but increased over time. In particular, the complaint alleged that, after the February 1975 punitive damages verdict in Kansas, Aetna intensified its involvement in the defense of the Dalkon Shield litigation, and that effective March 1, 1978, an agreement was entered into between Robins and Aetna that further altered the insurance relationship and made the parties essentially equally responsible for Robins' continuing failure to recall the remaining devices still in use.

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[2]The third alleged co-conspirator, Hugh Davis, was a citizen of Maryland.

At various places the amended complaint also alleged a cover-up by Robins, Aetna, and other co-conspirators involving the destruction of documents, perjury, and obstruction of justice. The principal thrust of those allegations was that the conspiracy injured the victims in their efforts to recover on their claims against Robins. In addition, the Breland plaintiffs alleged that these illegal acts resulted in required reports not being sent to the Food and Drug Administration which, in turn, would have led to public notice and recall of the Dalkon Shield, which would have prevented injuries to at least some Dalkon Shield victims.

The amended complaint implicitly recognized that more was required to recover against Aetna than proving that it was Robins' insurance carrier during the relevant period. Therefore, plaintiffs' theories of joint enterprise and conspiracy involved not simply a failure to warn, but affirmative acts of wrongdoing. However, according to the amended complaint, such acts did not begin until February 1975 (or perhaps as late as March 1978), and hence under those theories the 50% of the Dalkon Shield users who had their Shields removed prior to January 1, 1975, could not show the requisite causal connection between their injuries and the tortious conduct of Aetna that would entitle them to recover. Despite the potential for different results for different groups of women, depending on when they had their Shields removed, the complaint sought relief from Aetna in the form of compensatory and exemplary damages for *all* Dalkon Shield victims.[3]

The Breland complaint asked the court to certify a mandatory nationwide class, consisting of all Dalkon Shield victims who had filed a timely claim in the Robins' bankruptcy proceeding. Although the complaint contained allegations that there was a "predominance" of common issues of law and fact and that a class action was a

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[3]Count VIII of the complaint alleged that a settlement agreement between Aetna and Robins regarding the amount of insurance coverage that was owed by Aetna was collusive and should be set aside. Since petitioners raised no issue concerning that aspect of the complaint and its eventual resolution, it will not be mentioned further in this petition.

"superior" method of resolving this dispute — two factors required for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure — certification was sought only under paragraphs (A) and (B) of Rule 23(b)(1). The principal differences between subsections (1) and (3) are that the former does not require notice to class members upon certification, and it gives class members no right to opt out. According to the complaint, certification under paragraph (A) of subsection (1), which applies only when adjudications "would establish incompatible standards of conduct for the party opposing the class," was met because judgments "could result in inconsistent definitions of the legality of Aetna's conduct . . . ." The Breland plaintiffs also asserted that the requirements of paragraph (B), which applies to adjudications that "would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests," were satisfied. In their view, that test was met because early decisions would "as a matter of law foreclos[e] as a practical matter the arguments of subsequent plaintiffs" even though subsequent courts, in the same or other jurisdictions, would be legally free to reach different conclusions on the basic issue of whether Aetna was liable for its conduct to Dalkon Shield victims.

Petitioners are more than 500 Dalkon Shield victims and family members who have sought to maintain their own actions against Aetna because they believed both that the Robins bankruptcy might not produce sufficient funds to pay their claims in full and that the purported class action did not provide them with the best vehicle for a complete recovery against Aetna. In petitioners' view, Aetna was liable for their injuries because Aetna (a) assumed from Robins in 1975 the responsibility to monitor the performance of the Dalkon Shield and to decide whether or not to recall the product; (b) concealed the fact that Robins and its agents had engaged in the destruction of evidence in 1975; and (c) concealed the negative results of at least eight scientific studies which it had commissioned on the safety and efficacy of the Dalkon Shield.

From early on in this litigation, and continuing until its resolution by the district court, petitioners objected to their inclusion in this

case in a variety of different ways. Some sought permission to file their own lawsuits against Aetna alone in the United States District Courts for the Districts of Kansas and New Hampshire.[4] Robins and Aetna opposed the motions to lift the bankruptcy stay, and the district court agreed with them on the ground that, if the Breland case was certified as a class action, those seeking to file separate lawsuits might be members of that class.

Some of the petitioners challenged that decision, but the court of appeals affirmed. *See In Re A.H. Robins Co. (Oberg), supra*, note 4. In a foreshadowing of the issues presented in this petition, the court noted that the district court had by that time conditionally certified this case as a class action, but had not yet afforded petitioners an opportunity to opt out and pursue their own claims against Aetna. It went on to observe, however, that this Court had held in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 812 (1985), that "'due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.'" 828 F.2d at 1027. The court then held that the assertion that the Breland action did not adequately protect petitioners' interests was "premature" and should only be resolved if petitioners were denied the opportunity to opt out.

In the meantime, respondent Aetna had decided not to resist certification in this case, but embraced it as an opportunity to resolve all claims that might be filed against it in a single lawsuit. Since several hundred thousand women had filed claims against Robins, presumably there would be a similar number of Aetna claimants. Therefore, in order to avoid a multiplicity of trials and to have all the disputes resolved in a forum that appeared to be favorable to Aetna's position, Aetna offered that, if it were found liable on the common ques-

[4]Permission was required because of prior rulings extending the bankruptcy stay against litigation to *all* Dalkon Shield claims, whether or not Robins was included as a defendant. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 944 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *In Re A.H. Robins Co. (Oberg)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S.Ct 1246 (1988).

tion applicable to all cases, it would agree to be bound by the determinations of causation and the amount of damages that would be assessed in the process of resolving the individual claims against Robins in the bankruptcy proceeding. 146a. However, Aetna did not agree to pay the full amount of all claimants' compensatory damages if the funds from the Robins reorganization were insufficient, nor did it agree to pay punitive damages, for which it surely would have been liable if the allegations of criminal conduct against it were proven. Based on Aetna's representations and the amended complaint, and over the objections of some of these petitioners, the district judge, who was also handling the Robins' bankruptcy, certified a conditional mandatory class action in a brief order entered on December 29, 1986. 134a-135a. That order did not describe the class or state what part of Rule 23(b) governed, let alone explain the basis for certification of a mandatory class. Moreover, no notice to the class was provided, and no opt out was made available.

While this case was proceeding only against Aetna, Robins entered into a merger agreement with American Home Products Corporation ("AHP"), which became the central element in its Chapter 11 reorganization plan. To dispose of the Dalkon Shield claims, the plan established a separate Claims Resolution Facility, and it created a Claimants Trust that would be the exclusive source of funding for all Dalkon Shield victims. While the amount to be deposited in that Trust was quite substantial, petitioners believed that it was insufficient to pay all Dalkon Shield claims in full, and everyone — including Robins, Aetna, and the district court — recognized that possibility.

Robins was fully aware of this litigation and of the possibility of other cases being brought on similar theories. Therefore, Robins, in conjunction with Aetna, sought a means to end all litigation, except those cases proceeding under the plan against the Trust. To achieve that end, two additional steps were taken by Robins in conjunction with Aetna.

First, Aetna and the Breland plaintiffs entered into a class wide settlement, under which Aetna would make a cash contribution to

the Claimants Trust and provide some additional insurance if the Trust fund were insufficient. The size of Aetna's contribution is not at issue here. However, the fact that it is a limited one, which does not assure payment in full for all claimants, explains why petitioners have continuously sought to opt out of this class and to proceed independently against Aetna.

Despite the professed desire of Robins to have the litigation against Aetna finally concluded, the reorganization plan does *not* require that the settlement in this case (referred to in the plan and here as *Breland*) be upheld in order for the plan to be effective. Instead, the only requirement was that the district court approve the *Breland* settlement. Thus, if this Court grants this petition and sets aside the mandatory class action ruling, the plan may nonetheless still go into effect. In that case, under section 6.06(b) of the reorganization plan, Aetna would still be required to provide $100 million in insurance for the Dalkon Shield claimants, but it would not be required to make cash contributions or provide the other insurance agreed to as part of the *Breland* settlement.

Second, the plan also contained a provision enjoining all suits by Dalkon Shield victims against third parties (other than doctors, hospitals, and other health care providers) on any Dalkon Shield related claim, including those against the alleged co-conspirators described in the *Breland* complaint. The injunction did not apply to suits against Aetna, which were treated separately, but unlike the *Breland* settlement, final approval of the injunction was specifically made a condition precedent to the consummation of the Robins and AHP merger and the implementation of the Robins reorganization plan. Under that injunction, which is being challenged in this Court in another petition being filed simultaneously with this one, *Rosemary Menard-Sanford v. A.H. Robins Company, Inc.*, all of the co-conspirators mentioned in the *Breland* complaint, as well as various lawyers and law firms and other individuals referred to, but not named, in the complaint and other papers, would be released from all liability — even for civil damages resulting from their criminal conduct — without Dalkon Shield victims ever having their day in court against them.

After tentative settlements of both the Chapter 11 proceeding and this case were reached, the district court returned to the class certification question and made its conditional certification order of December 1986 final, in an order entered on April 12, 1988. 136a-137a. Although the order did not specify the portion of Rule 23 on which it was based, it is plain from the accompanying memorandum that the court certified a mandatory class under Rule 23(b)(1)(A) on the theory that the resolution of the basic liability issue should be decided in one forum in order to prevent "incompatible standards and conflicting decisions" (153a), *i.e.*, Aetna winning some cases and losing others. The court asserted that allowing an opt out would destroy the effectiveness of this ruling and that Aetna's concession on the disposition of individual claims through the Claims Resolution Facility eliminated any other problems posed by mandatory class certification. 153a-154a. After giving notice to the class, the district court held a fairness hearing and approved the settlement, over petitioners' strenuous objections, as to both the absence of an opt out and the adequacy of the settlement. 160a-177a.

2. *Opinion of the Court of Appeals*

The court of appeals affirmed. In a lengthy opinion, the court first addressed the background of both the lawsuits directed against Robins and the litigation aimed at Aetna. Then the court turned to an overview of past class actions in the context of mass tort litigation, including a detailed discussion of how the courts and commentators have viewed Rule 23 from 1966, when major changes were made in the Rule, to the present. The court's analysis of the merits of the case, which started on page 77 (66a), began with the court's announcement that the "overriding fact" that lies at the core of its disposition of the appeal is the "uniqueness" of this case because of the hundreds of thousands of claimants. *Id.*

The court next observed that the role of Aetna as an active participant "goes to the very heart" of the case and "overhangs other issues" (68a). Since Aetna's liability had to be established for the plaintiffs to prevail, the court concluded that it is "very much in

the interests of both Aetna and Dalkon Shield claimants" to have the question resolved through a class action (68a). That would be true for victims, of course, only if the named plaintiffs actually prevailed in this litigation. The court then stated that the liability determination would not depend on facts relating to individual victims, *id.*, which would be true only if the plaintiffs relied on the theory, which petitioners have consistently downplayed, that there was a joint enterprise from the start. However, if petitioners' alternative approach were pursued, Aetna's liability would increase over time as it became more involved in the decision-making concerning the recall, the coverup, and the other criminal activity. Under that approach, the time period during which each woman wore the Shield would be critical.[5]

The court then asserted that, absent certification of a mandatory class, the question of Aetna's role would have to be resolved in every case, with the resulting risk of inconsistent verdicts that the court claimed would produce a "chaotic situation" that would be "intolerable" (69a). The court then returned (70a-74a) to Aetna's promise to submit all individual disputes on causation and the amount of damages to Robins' Chapter 11 Claims Resolution Facility and to Aetna's agreement to make a payment to the Claimants Trust. According to the court, that promise would enable all of the cases to be resolved with what the court said was "fairness to all" (70a), which is true only if the risk of inadequate funding is overlooked, as the court did.

Next, the court addressed petitioners' due process argument, which was based on the absence of an opt out provision as required by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). 74a. The court responded by asserting that, in effect, there was an opt out, since each claimant had a right to an individual settlement or a jury trial of her damages claim against the Claims Resolution Facility.

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[5]The court's first mention of destruction of documents and other criminal activity is on page 105 of its 107-page opinion. 89a. A more complete statement of the basis for the claimed criminal activity of Robins and its co-conspirators is contained in the *Menard-Sanford* petition at 14-15.

That response completely overlooked the desires of many claimants, including petitioners, to litigate the principal issue concerning the liability of Aetna (and other co-conspirators) for compensatory and punitive damages in a place other than Richmond, where Robins is headquartered and where the district court has already stated that it believes that the case against Aetna is a weak one. 174a-176a. And it disregards their desire to be represented by counsel that they, not Glenda Breland, have chosen.

The court then attempted to distinguish all prior circuit court opinions on the propriety of class actions in mass tort cases, none of which had upheld a mandatory, non-opt out class under Rule 23(b)(1). First, it referred to the decision in *McDonnell Douglas Corp. v. United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), as "outdated" (78a). Then it cited two asbestos cases, *School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), and *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), and the reluctant upholding of class certification in order to sustain the settlement in *In Re Agent Orange*, 818 F.2d 145, 166 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 695 (1988), to refute petitioners' claim that no court of appeals had ever sustained a mass tort class certification. *Id.* But the Fourth Circuit failed to acknowledge at that point the critical distinction between those cases and this one — the classes there were certified under Rule 23(b)(3), which gave every claimant the right to opt out. When the court finally acknowledged that distinction (82a), it again asserted that the victims had "in practice, though not in express language," the functional equivalent of an opt out here because of their right to litigate their individual claims under the Claims Resolution Facility. *Id.*

In an effort to assure victims that they would be paid in full, the court proclaimed that the Claimants Trust "will be sufficient" to assure "full payment" for all victims who had filed timely claims (84a). Then, overlooking the entire rationale for this case and the reasons for petitioners' objections to the Robins reorganization plan, as well as the admission in Robins' disclosure statement that the Claimants Trust may be inadequate to pay all claimants in full, the

court erroneously asserted that "[n]either the appellants nor anyone else has asserted that the fund is insufficient." *Id.*

Compounding its misunderstanding, the court next announced that the reorganization plan and this case are "interdependent" so that "[f]ailure of approval of either the Plan of Reorganization or the *Breland* settlement would derail hopelessly the carefully negotiated and crafted Plan and Settlement leaving the Dalkon Shield claimants to the vagaries, expenses, and delay of further litigation." 85a. Like its erroneous claim about full funding, this assertion is demonstrably wrong since the plan required only the district court, and not the court of appeals or this Court, to approve the *Breland* settlement in order for the plan to be consummated. Since that condition has been met, even if the certification ruling had been overturned by the court of appeals, or is set aside by this Court, the reorganization plan may still go forward.[6]

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[6]The plan does not state this proposition itself in so many words, but it can be derived from two sources. First, under section 6.06(b) of the plan, Aetna is obligated to make payments to the Claimants Trust even if there is no final order approving the *Breland* settlement, if the merger with AHP is otherwise ready to be consummated. Second, section 7.02(b) of the plan requires that all of the conditions of the merger agreement be satisfied. One of those conditions is contained in section 7.1(g), which requires that "the Court [defined in section 1.34 of the plan to be the U.S. Bankruptcy and/or District Courts for Eastern District of Virginia] shall have entered an order approving a Qualified Breland Settlement, ***whether or not such order shall have been reversed or stayed pending appeal***" (emphasis added).

REASONS FOR GRANTING THE WRIT

A. The Class Certification Ruling Is In Conflict With Every Court of Appeals That Has Considered This Or Similar Issues and Represents Such a Marked Departure From Accepted Practice That It Warrants Review By This Court.

The court of appeals upheld a mandatory, nationwide class under Rule 23(b)(1) for personal injury tort claims by approximately 195,000 Dalkon Shield victims, despite the fact that petitioners and others had substantial disputes over the management of the putative class and over whether the proposed settlement should be accepted. No victim who filed a timely claim in the Robins reorganization was given the right to opt out of the settlement with Aetna, as they would have had under a class certified under Rule 23(b)(3). As a result, those victims will never be able to sue Aetna on the issue of its civil liability to victims for its role in an alleged criminal conspiracy. While each victim can have her day in court against the Claimants Trust established under the reorganization plan, she is foreclosed from suing Aetna if that Trust is not sufficient to pay her claim in full. The question whether Rule 23 allows a mandatory class action in these circumstances requires this Court's consideration.

The sole reason given by the court of appeals for sustaining the class here is that there is one central issue governing each victim's case, and that, without a mandatory class, there might be inconsistent results on this issue. But even if the "central issue" theory applied here — which it does not — it has been rejected by every court of appeals that has considered it as a basis for mandatory certification under Rule 23(b)(1). *See, e.g., McDonnell Douglas Corp. v. United States District Court for Central District of California*, 523 F.2d 1083, 1086 (9th Cir. 1975); *In Re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982); *In Re Bendectin Products Liability Litigation*, 749 F.2d 300, 305 (6th Cir.

1984); *School Asbestos Litigation*, 789 F.2d 996, 1002 (3rd Cir. 1986); *In Re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988).[7]

While a few decisions have upheld mandatory class actions under Rule 23(b)(1) where damages were involved, they have done so only where injunctive relief was essential to remedy the violations alleged in the complaint or to establish uniform conditions governing future relations between the parties. *See, e.g., Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2nd Cir. 1977), and *Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978). This line of cases is inapplicable here because no injunction was ever sought against Aetna, nor would an injunction offer relief to Dalkon Shield victims, whose injuries can be remedied, if at all, only by money damages.

Some courts have held out the possibility of certification under Rule 23(b)(1)(B) where a limited fund is available (especially for punitive damages). *See, e.g., In the Northern Dist. of Calif., Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 851-852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In Re Bendectin Products Liability Litigation, supra*, 749 F.2d at 305, but no court of appeals has ever allowed mandatory certification on that basis. Moreover, in this case, no party has claimed that Aetna has a limited fund for distribution. While Aetna's insurance policy with Robins had a limitation, that fact is irrelevant to this case since the relief sought would come from the general assets of Aetna, as a principal and alleged wrongdoer, not from its contractual liability to provide insurance to Robins.

Until the decision below, every federal appeals court that had considered a mandatory class of any kind under Rule 23(b)(1) had rejected it. *See In Re Temple, supra*, 851 F.2d at 1271, 1272 (requir-

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[7]Nor do petitioners acquiesce in the court of appeals' erroneous assumption that the "central issue" of Aetna's liability is common to all victims. Under the theories of liability pressed by petitioners, but given little attention by the Breland plaintiffs and their counsel, Aetna could be found liable to some victims, but not to others, even by one fact-finder in a single proceeding.

ing review of certification of mass tort claims under (b)(1) with "utmost scrutiny" and finding any such certification to be "highly suspect"). Therefore, the acceptance of this novel theory by the Fourth Circuit creates a direct conflict among the circuits on an important issue of federal procedure that this Court ought to resolve.

Indeed, even when certification of mass tort actions has been sought under Rule 23(b)(3), which explicitly requires an opportunity to opt out, the courts have been extremely reluctant to approve it. Thus, the court in *In Re Agent Orange*, 818 F.2d 145, 165-67 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 695 (1988), upheld certification under Rule 23(b)(3), principally because plaintiffs' evidence of causation was so weak and the military contractor defense was so strong. Moreover, the Second Circuit's willingness to approve certification in that case was also heavily influenced by the fact that there had been a settlement of all of the claims and summary judgment had been granted against all those who had opted out. *Id.*; *see also In Re Beef Industry Antitrust Litigation*, 607 F.2d 167, 174-75 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (approving class certification for purposes of settling with one defendant, only because of "genuine option" of class members to opt out).

The court of appeals here did not decide whether it could have sustained certification under Rule 23(b)(3) (82a), but if it had, it would have had to allow petitioners to opt out, which the settlement and the district court certification order did not permit. Again, the reluctance of the courts to approve mass tort class action certifications under Rule 23(b)(3), even with its opt out protection, underscores the deviation by the district court from accepted standards in certifying this case under Rule 23(b)(1), and by the court of appeals in affirming the certification order. Moreover, if sustained, this approach to class certification in tort cases would allow for wholesale evasion of not only the opt out requirements in Rule 23(b)(3), but also of Rule 23's other protections, including the requirements of Rule 23(c)(2) of the best practicable notice (to be paid for by the plaintiffs), and the explicit right of class members to intervene or otherwise participate.

The rationale adopted by the court of appeals would also have far reaching impacts that further support review by this Court. According to the Fourth Circuit, because there is a central question as to the liability of Aetna that is common to all victims, it is in the best interest of everyone to have that question resolved in a single forum. That justification would, of course, apply to most mass tort cases and to all class certifications sought under all sub-parts of Rule 23 and would thereby obliterate the carefully constructed differences between them. *See McDonnell Douglas, supra*, 523 F.2d at 1086 (expansive interpretation of Rule 23(b)(1) would render Rule 23(b)(3) "superfluous"); *In Re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987) (broad interpretation of Rule 23(b)(1)(A) would make "other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)"). Whatever the theoretical merits of such a scheme, "Rule 23, as written, does not support the district court's action." *Id.* at 1546. Rule 23 is far more balanced and precise, and it does not automatically bring within its ambit every multi-plaintiff case that may turn on an important central issue. The Rule recognizes a number of other interests in deciding whether a class is certifiable. Here, those interests would include the opportunity to litigate the central issue in a different forum, which might be more convenient for the victims, which might apply different and perhaps more favorable law, including in states such as Colorado the right to pre-judgment interest, and which would afford the victims an opportunity to have their own counsel who could emphasize a different theory of the case or focus on different evidence.

The courts below, however, took none of these interests into account. Contrary to what the court of appeals seems to suggest, nothing in Rule 23 gives self-designated class champions the right to decide for all those who are in a similar situation where and how their claims must be litigated, simply because a court believes that it would be more efficient to have the central question decided in one case for all time. This wholesale sacrifice of the interests of victims on the altar of efficiency is a sufficiently disturbing rationale alone to justify granting certiorari alone. *Cf. McDonnell Douglas, supra*, 523 F.2d at 1087 (Chambers, Wright & Kennedy, J.J., dissen-

ting from denial of rehearing *en banc* because class certification issues are of "tremendous importance").

The court's only effort to justify the absence of an opt out was its assertion that because the claimants could request a trial by jury under the Claims Resolution Facility, they have the functional equivalent of an opt out. That rationale, if accepted by other courts would undermine the protections afforded by Rule 23 and, on the facts of this case, it is an unsupportable version of what the district court did. Thus, in its memorandum granting class certification, the district court specifically stated that it "will not approve any opt-out provision" because that "would severely impede the interests of other class members as a practical matter." 153a, 154a. Moreover, the functional equivalent theory also overlooks the fact that petitioners and others who do not agree with the way in which this action was being handled will be barred from litigating the central issue of liability in another forum, with counsel of their own choosing. Therefore, even under the court's mistaken premise, petitioners have only been granted a partial opt out. Because no court has ever held that such a limited opt out satisfies Rule 23(b)(3), the court of appeals has created a major new interpretation of Rule 23 that further supports plenary consideration by this Court.

Furthermore, to satisfy the premise of equivalence, each victim must have the right to recover all of her damages. In this case, that would mean either that there would be no cap on the Claimants Trust or that Aetna would agree to guarantee the difference between the cap and the amount needed to compensate all victims in full. Aetna, of course, made no such pledge, and now that the reorganization plan and the *Breland* settlement have set a ceiling on the Claimants Trust, it is apparent that there is no right on the part of victims to look to Aetna for full compensation.

There is another problem caused by the method by which the Aetna contribution to the Claimants Trust will be distributed: the money will benefit all Dalkon Shield claimants proportionately. But as petitioners noted above, those with pre1975 claims have the weakest case against Aetna and the other coconspirators, and they

amount to approximately 50% of all claimants. Indeed, those claimants who were still wearing the Shield after 1978 may have an even a stronger claim because of the agreement entered into between Aetna and Robins at that time. Despite the fact that the purported common issue of liability may not be common to the entire class, all Dalkon Shield victims, regardless of when their injuries were sustained, or when they removed the device, will share in the Aetna contribution; that plainly would not happen if there were a real opportunity to opt out.

Finally, punitive damages are not allowed under the plan, and hence the court's argument that petitioners have the functional equivalent of an opt out overlooks that aspect of petitioners' claims as well. While petitioners do not question the elimination of punitive damages against a corporation like Robins, which is undergoing reorganization, the denial of the right to sue a solvent company like Aetna for punitive damages further undermines the assertion by the court of appeals that petitioners were given the functional equivalent of the right to opt out.

Accordingly, both because of the conflicts in the circuits and the importance of the decision below to the application of Rule 23 to mass tort cases, this Court should grant review.

B. The Denial of the Right To Opt Out Conflicts With *Phillips Petroleum* and Other Due Process Decisions of This Court

If the Court concludes that this case was properly certified as a non-opt out class under Rule 23(b)(1), it then must address the question whether, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the due process rights of these petitioners were violated. In *Phillips Petroleum* this Court stated in no uncertain terms that, in class actions principally involving claims for money damages:

> we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

Id. at 812. At one time, when certain petitioners were seeking to file their own actions against Aetna, the Fourth Circuit apparently agreed that *Phillips Petroleum* gave these petitioners a right to opt out, *see* p.8, *supra*, but it now appears to have abandoned that view in favor of a rule allowing courts to substitute what they consider to be a functional equivalent in place of an actual opt out. Or perhaps the court of appeals believes that the federal courts are not bound by the due process limitations imposed on state courts under *Phillips Petroleum*. But whatever its rationale, the court of appeals has plainly not followed the clear mandate in *Phillips Petroleum*.

The class certified here consists of a nationwide group of 195,000 or more victims. None of them ever had any direct contact with respondent Aetna concerning this matter. This suit was only transferred to Virginia because that is where the Robins bankruptcy was pending. Indeed, most of the victims had no connection with Virginia other than that was the place where their Dalkon Shield was manufactured. Moreover, they did not buy the Shield from Robins directly, but obtained it from their physician. The question is, can 195,000 women be required to litigate their claims against Aetna in Virginia or lose their rights entirely?[8]

Phillips Petroleum held that an opt out was constitutionally required for a nationwide damages class action brought in state court, and at least one court of appeals, *In Re Temple, supra*, 851 F.2d at 1272, and three district courts, *Waldron v. Raymark Industries*, 124 F.R.D. 235, 238 (N.D. Ga. 1989); *Avagliano v. Sumitomo Shoji America, Inc.*, 107 F.R.D. 748, 749-50 (S.D.N.Y. 1985); and *In Re Jackson Lockdown MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985), have concluded that the ruling applies fully to federal court litigation. *Accord*, Miller & Crump, *Jurisdiction And Choice Of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 30-31 (1986);*School Asbestos Litigation, supra*,

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[8]The fact that the class was certified for settlement purposes is of no significance to the question whether petitioners have a constitutional right to opt out since they also objected to the settlement. While the settlement may make the case more manageable, it does not in any way obviate the due process objections raised here.

789 F.2d at 1002 (recognizing problems with personal jurisdiction and intrusion on states from non-opt out in federal court class action).

Moreover, only this past term in *Martin v. Wilks*, 109 S. Ct. 2180, 2183 (1989), this Court restated the "general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." Thereafter, quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), the Court described this rule as "a principle of general application of anglo-American jurisprudence. . . ." *Id.* at 2184. If due process required that the objecting parties in *Martin* be given their day in court, so here, petitioners must be given their opportunity to litigate their claim against Aetna and not be swept into a mandatory, nationwide class as part of a settlement to which they strenuously object.

Phillips Petroleum did not completely eliminate the mandatory class action in appropriate cases under Rule 23(b)(1), because this Court stated that its "holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. But *Phillips Petroleum* should have made it clear that the district court could not, consistent with the Due Process Clause, prevent petitioners from opting out of a lawsuit for money damages in which they had chosen not to participate. And the holding in *Phillips Petroleum* should also have made it clear that those thousands of Dalkon Shield victims who did not wish to take part in the *Breland* action could not be bound by settlement terms that were crafted by counsel that they did not choose and that were forced upon them in a forum where they did not wish to litigate.

In an effort to avoid the inevitable conclusion from *Phillips Petroleum* that the denial of the right to opt out in a damages case like this is unconstitutional, the court of appeals sought refuge in what it saw as the more "flexible" approach of *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), that it found was satisfied by what the court saw as a functional equivalent of an opt out (76a). *Mathews*, of course, did not involve any issues related to the power of a court

to deny persons their right to pursue independent claims for money damages outside the scope of a class action. Moreover, as we have previously demonstrated, petitioners were not given even the functional equivalent of an opt out. *See* pp. 19-20, *supra*. But even if the *Mathews* test were applied here, a nationwide non-opt out class is clearly impermissible because the individual's interest in her own adjudication of her own tort claim, in the jurisdiction of her choice, with her own counsel, far outweighs the societal interest in having a single, unified class determination. This is particularly so in the context of a mass tort case that does not involve a single disaster or catastrophic event, where there is no common issue of liability, and no single forum uniquely appropriate for resolving all of the claims. *See* Miller & Crump, *supra*, 96 Yale L.J. at 55-56.

Finally, the decision below is also inconsistent with the spirit and method of analysis in the recent decision of the Third Circuit in *In Re Real Estate Title & Settlements Services Antitrust Litigation*, 869 F.2d 760 (1989), *cert. pending sub nom. Chicago Land & Title Co. v. Tucson Unified School District*, No. 88-2050, filed June 15, 1989. There the court held that it violated due process for a federal court in Pennsylvania to enjoin Arizona plaintiffs from pursuing claims in the Arizona state courts, even though those plaintiffs had been members of a mandatory class certified under Rules 23(b)(1) and (b)(2), whose case in the Pennsylvania court had been settled with court approval, and those plaintiffs had unsuccessfully appealed the denial of a right to opt out of the settlement. While the cases are factually distinguishable, the Third Circuit was much more solicitous of the due process rights of absent class members than was the Fourth Circuit here, a difference that provides a further basis for review by this Court.

The clear failure of the court of appeals to abide by this Court's holding in *Phillips Petroleum*, and the impact that the decisions below may have on our basic shared assumptions about how the anglo-American system of jurisprudence is supposed to work, warrant this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 14, 1989

No. 89-442

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALEXIA ANDERSON, *et al.*,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 88-1755, 88-1757, 88-1766, 88-3604

In Re:

A. H. ROBINS COMPANY, INCORPORATED

Debtor

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (C/A 85-1307-R)

Argued: December 6, 1988 Decided: June 16, 1989

Before RUSSELL, WIDENER, and CHAPMAN, Circuit Judges.

Irving R. M. Panzer (Robert E. Manchester; John T. Baker; Bradley Post; James F. Szaller; Sidney L. Matthew, on brief); Joseph Francis McDowell, III (CULLITY, KELLEY & MCDOWELL on brief) for Appellants. John G, Harkins, Jr. (Deborah F. Cohen, Richard B. Herzog, Gerald P. Norton, Mark Schattner, PEPPER, HAMILTON & SCHEETZ, on brief); Joseph Stuart Friedberg (JOSEPH S. FRIEDBERG, CHARTERED; Ronald I. Meshbesher, (MESHBESHER, SINGER & SPENCE, LTD.; John A. Cochrane, COCHRANE & BRESNAHAM, P.A.; Herbert B. Newberg, Martin J. D'Urso, HERBERT B. NEWBERG, ESQUIRE, P.C.; James Hovland, KRAUSE & ROLLINS; Douglas W. Thomson, THOMSON, HAWKINS & ELLIS; Theodore I. Brenner, BREMNER, BABER & JANUS; W. Scott Street, III, A. Peter Brodell, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, on brief) for Appellees.

RUSSELL, Circuit Judge:

This diversity suit by seven individual claimants, suing on their own behalf and as the proposed class representatives of all injured Dalkon Shield claimants,* seeks recovery against Aetna Casualty and Surety Company (Aetna) for injuries resulting from the use of an allegedly defective intrauterine device known as the Dalkon Shield. Aetna was neither the manufacturer nor the vender of the device; it was the products liability insurance carrier of A. H. Robins Company, Inc. (Robins), the manufacturer and distributor of the device. It is the theory of the plaintiffs that Aetna's conduct, while acting in its role as insurance carrier, was such that it rendered itself liable as a joint tortfeasor with Robins for any injuries sustained by persons using the device. The plaintiffs sought class certification of the suit. During consideration whether to give final certification of the suit, the parties entered into a settlement of the action conditioned on certification. After a duly-noticed hearing, the District Court granted in separate orders final class certification of the action and approval of the settlement of the action so certified. The appeal challenges the two orders. Since the two orders from which the appeals are taken are intimately connected, the two appeals have been consolidated. We affirm both the class certification and the settlement orders.

I.

In the early 1960's, Dr. Hugh Davis, a gynecologist on the staff of the Johns Hopkins Hospital and the Johns Hopkins Medical School, developed an intrauterine device which has been generally described as a Dalkon Shield. In conjunction with some associates, Dr. Davis, in the mid 1960's, began to manufacture and sell on a small scale the Dalkon Shield. This limited operation continued until early 1970 when A. H. Robins Co., Inc, (Robins), which was a well-recognized and successful manufacturer and marketer of pharmaceutical products, acquired the exclusive right to manufacture and market the Dalkon Shield. In his findings in connection with this purchase by Robins of exclusive rights in the manufacture and sale of the Dalkon Shield, the District Judge said:

> Prior to that time (*i.e.*, the purchase of the Dalkon Shield),Robins had never marketed any kind of a birth control product and had no gynecologist on its medical staff. Nevertheless, Robins did no further testing, readily accepted the figures of the inventor's testing, and aggressively promoted the device to the medical profession and, uniquely for such a device, to the general public.

Robins, however, did not begin the marketing of the device until early 1971. Whether as a result of the promotional efforts of Robins or not, the product received wide public acceptance, and its sale was brisk. Between 1971 and mid-1974 when sales were discontinued, some 2,200,000 Dalkon Shields were sold. These sales generated a gross revenue for Robins of $11,240,611.00 and a gross profit of $505,499.00. [1]

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[1] These figures are taken from the opinion in *In re A. H. Robins Co., Inc.*, 89 Bankr. 555, 557 (E.D.Va. 1988).

The product, however, had hardly been introduced into the market before what the District Court herein described "as an extraordinary volume" of complaints of injuries suffered by reason of its use began to surface. By 1973, the complaints had reached such a level that Robins felt compelled to send its first "Dear Doctor" letter to the medical profession advising the profession of a septic abortion problem arising out of the of use the device along with a suggestion for reducing the risk of such problem. The complaints from users of the device, however, continued at such a pace that by mid-1974 Robins finally withdrew the product from the market. Robins did not, though, issue any product recall until September 1980, when it addressed its second "Dear Doctor" letter to the medical profession. In this letter it recommended that the devices be removed from all continuing users, even those with no manifest problems, and it noted, as summarized by the District Court, that "long-term users of all IUD's had a higher risk of exposure to actinomyces, a virulent strain of microorganism implicated as a cause of pelvic inflammatory disease." However, there was no realistic recall of the Dalkon Shield until 1984.

The early complaints of injury from the use of the device quickly generated lawsuits against Robins in various parts of the country. Aetna Casualty and Surety Company (Aetna), as the products liability insurance carrier, was obligated to defend the suits filed against Robins in that connection. The first action to come to trial against Robins charging injuries from the use of the Dalkon Shield arose in the state court in Kansas and resulted in a verdict in February 1975 in favor of the plaintiff in the amount of $85,000, including a $75,000 punitive damage award. This verdict was widely publicized and the filing of actions against Robins quickened.[2] This multiplication of suits—such, for instance, as approximately two hundred at the same time in the Northern District of California [3] and in the District of Maryland,[4]—posed a serious problem of manageability for the courts

before which the suits were pending.

Many of the courts referred the multiplicity of suits in their district for consolidated pre-trial proceedings under the direction of the Judicial Panel on Multi-District Litigation in the hope that such action might reduce the difficulties of disposing expeditiously of the mounting Dalkon Shield case burden. *See In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation*, 406 F. Supp. 540 (J.P.M.D.L. 1975); 419 F.Supp. 710 (J.P.M.D.L. 1976); and 438 F. Supp. 942 (J.P.M.D.L. 1977). After the entry of a number of such orders of transfer, the Judicial Panel finally concluded that their previous orders accepting transfers had accomplished as much as could be achieved in reducing pre-trial proceedings and it began vacating later transfer orders, returning the cases for further proceedings to the respective transferor courts. *In re A. H. Robins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation,* 453 F. Supp. 108 (J.P.M.D.L. 1978); and 505 F. Supp, 221 (J.P.M.D.L. 1981). While these proceedings before the Judicial Panel had aided the problems of discovery in the Dalkon Shield cases, they did nothing to relieve the clogging of court calendars by the constantly increasing stream of Dalkon Shield cases to be tried, nor did they reduce substantially the trial time of the cases.It was manifest that other measures were required if this overloading of

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[2] There appears to have been considerable recruiting of claimants by attorneys. In one case, the recruiting prompted a proceeding under the Ohio Code of Professional Responsibility. The attorney had successfully secured 106 claims through his advertising. For the Supreme Court decision on the practice, *see Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

[3] *See In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

[4] *Hodson v. A. H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

the courts with Dalkon Shield cases was to be relieved.

District Judge Miles Lord of the Minnesota District Court, to whom had been assigned in the late 1970's and early 1980's a large number of Dalkon Shield cases, determined to try his hand at expediting the disposition of such cases as were before him. He consolidated a large number of such suits and appointed a lead counsel to handle discovery. He prodded the counsel so appointed to proceed aggressively, and he named two masters to sift through all the material discovered and to prepare a report for counsel and the court based on all material discovered and any developed in their independent investigations.The masters did conduct considerable independent investigations. Thus,they reviewed carefully the relevant records in the files of Robins and inquired into the possible involvement of Aetna with Robins in the defense planning and activity. All of this discovery, along with that developed by lead counsel, was catalogued by lead counsel appointed by the Court. The suits in litigation before Judge Lord, however, were at this point settled for $38 million and no further proceedings were had in Judge Lord's court (and that of his successor). The lead counsel in this litigation before Judge Lord withdrew from any subsequent Dalkon Shield litigation but made available to counsel in other cases the discovery developed in that case.

II.

Other courts took another tack in an effort to manage expeditiously and fairly the mass of Dalkon Shield cases. They turned to the class action procedure provided by Rule 23, Fed.R.Civ.P. The great volume of cases which were inundating the court system and the similarity of the issues in all the cases, it was thought, provided a proper basis for class treatment both in the interests of the parties and of the courts.The first case in which this procedure was invoked was *Rosenfeld v. A. H. Robins Co., Inc.*, 63 A.D.2d 11, 407 N.Y.S.2d 196 (N.Y. App.Div.), *appeal dismissed*, 46 N.Y.2d 731, 413 N.Y.S.2d 374, 385 N.E.2d 1301

(1978). In that case, the plaintiffs sought class certification under a New York statute modeled after Rule 23, and Robins, oddly enough, opposed such certification. The motion court denied certification and, on appeal, that decision was affirmed. The court, in affirming that decision, stated that:

> In view of the complicated issues of fact which must be resolved on an individual basis, it is our opinion that common questions of law and fact do not predominate in this action and that the Special Terms correctly denied plaintiffs' motion for class certification.
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> 407 N.Y.S. [2d] at 201.

The court added as the rationale for this conclusion that "[t]he difficulties involved in determining the causality of injuries of this sort cannot be overstated." *Ibid.* at 201. It also denied partial certification because the issues which would have been pertinent in such a certification were "so thoroughly intertwined with those which must be determined individually." *Ibid.* at 201. It is obvious from these comments that it was the problem of individual causality which motivated the court in its denial in this case of class certification.

The next stab at class certification arose in *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887 (N.D. Cal. 1981) *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). In that case, the District Judge, confronted with a mass of Dalkon Shield cases pending for trial in his court, concluded that a class certification was an appropriate—in fact, the only—available procedure for expediting the fair disposition of such suits by preventing a waste of judicial resources in trying individually cases in which there would be an endless repetition at great length of many of the same facts. He accordingly proceeded on his own motion to certify a nationwide class action on the issue

of punitive damages under Rule 23(b)(1)(B) and a statewide (California) class action on the issue of liability under Rule 23(b)(3). He supported his decision with a cogently reasoned opinion. However, on appeal, that decision was reversed. 693 F.2d 847 (9th Cir. 1982).

The Court of Appeals, in reversing the District Court's certification sought to divide the certification issue into two broad categories: One deals with the class (b)(3) certification of the issue of liability for the manufacture and sale of a defective product; the second relates to the District Court's certification under the "limited fund" doctrine of the claim for punitive damages under (b)(1)(B). On the first point, the Court of Appeals said that, despite the fact that the certification under (b)(3) was "limited to the issue of liability," "Robins' overall liability, under some of the theories [of liability], cannot be proved unless each plaintiff also proves that Robins' breach of duty proximately caused her particular injury." 693 F.2d at 853, 856. It recognized that Rule 23(c)(4)(A) authorizes and encourages separating issues for certification where economies of trial may be achieved, but dismissed the use of such authority in this case because "[t]he complexity of issues peculiar to individual claims militates against grouping all plaintiffs into a class for only part of their recovery" and "[t]he few issues that might be tried on a class basis in this case, balanced against issues [such as causation and damages] that must be tried individually, indicate that the time saved by a class action may be relatively insignificant. A few verdicts followed by settlements might be equally efficacious."[5] *Ibid.* at 855, 856. It then added this somewhat contradictory sentence: "We do not preclude further considera-

[5] This sentence suggests that settlement was the method by which these mass torts should be solved. It indicated that a few trials might provide a basis for such settlement. At the time there had been a score of verdicts in Dalkon Shield litigation. This basis for settlement was present. But was the court suggesting a class certification for settlement purposes? The opinion is unclear. We discuss this point later on in this opinion.

tion by the District Court of motions to certify a more limited class or subclasses under Rule 23(b)(3)," *Ibid.* at 856, seemingly suggesting that if the District Court would further break the issue down certification might be appropriate. It proceeded to add that the petitioner for class certification had failed to satisfy the "typicality" requirement of subsection (a)(3) or the "superiority" requirement of (b)(3). For this conclusion the Court of Appeals relied on the Advisory Committee's Note to (b)(3) and on *La Mar v. H & B Novelty and Loan Co.*, 489 F.2d 461 (9th Cir. 1973) and *McDonnell Douglas Corp. v. U.S. District Court for the Central Division of California, et al.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), two cases which held that the "flexible" language of Rule 23 itself had, in the interest of manageability, to be reined in with constraining limitations, which were not expressed in the Rule.[6] The Court of Appeals appears to have found also that the (a)(4)requirement of "adequate representation" was not met. In that regard, it stated that "[n]o plaintiff has appeared in this appeal in support of class

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[6] *McDonnell Douglas* held (1) that "[n]one of these subdivisions, [of (b)(1)(A), (b)(1)(B) or (b)(2)] permits certifications of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages," and (2) the "'incompatible standards of conduct' of subdivision (b 1 A) must be interpreted to be incompatible standards of conduct required of the defendant in fulfilling judgments in separate actions" and "actions" and "a judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff" did not satisfy this standard.

Both of these rules, the first of which is stated at page 1085, 523 F.2d, and the second at page 1086, are premised in *La Mar*, *supra*, in which the court had said it had to depart from the "flexible" language of the Rule itself and to fashion its own a set of principles that would render the Rule inapplicable to damage suits. As we shall see, the "trend of the decisions" is contrary to this limiting construction of the Rule as stated in *La Mar* and *McDonnell Douglas*. *See School Asbestos Litigation*, 789 F.2d 996, 1009 (3d Cir. 1986). We discuss these cases in more detail later herein.

representative, "none of the attorneys already involved [was] willing to serve as class counsel" and the District Court had been forced to appoint counsel to maintain the class action, 693 F.2d at 850-51. The appointed counsel had resigned and the replacement had not started to represent the class.[7] 693 F.2d at 850-51. However, in concluding this phase of its opinion, the Court of Appeals ambiguously said:

> We are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases, but the combined difficulties overlapping each of the elements of Rule 23(a) preclude certification in this case. 693 F.2d at 851.

In reversing the certification of the punitive damages claim under (b)(1)(B), the Court of Appeals held apparently that to qualify for certification under the "limited fund" doctrine, the movant for certification must prove the fact that the fund is

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[7] As we see later, several courts consider this the real basis for the court of appeal's decision. In *Agent Orange*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), Judge Weinstein said: "The Court's decision [in *In re Dalkon Shield*, 693 F.2d 847] was based largely on the fact that no plaintiff or defendant supported certification."

In Re Temple, 851 F.2d 1269, 1273, n 7 (11th Cir. 1988), the court construed *In re Dalkon Shield* as approving class action certification of "mass torts" situations, though not of "products liability" actions. Thus *Temple* states: "[s]ome courts have noted that mass torts caused by a single transaction, *i.e.*, a plane crash, might be proper subject of a class action. *In re Dalkon Shield*, 693 F.2d at 853," impliedly finding that a products liability case was not proper. The reason assigned by *In re Dalkon Shield* for its distinction between the mass torts and products liability suit in this regard was that in the mass torts "the cause of the common disaster is the same for each of the plaintiffs"; whereas in the products liability action, "individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage." 693 F.2d at 853.This distinction, however, is not applicable in this case. The defectiveness of the Dalkon Shield is the issue of causation in every Dalkon Shield case, just as the crash of the plane is the common cause in the mass torts action construed by the Court.

movant for certification must prove the fact that the fund is inadequate to pay all claims "inescapably," 693 F.2d at 851, and it found that the District Court had erred in finding to the contrary in entering an order of certification of the punitive damage claim under (b)(1)(B).[8]

In 1984, Robins itself thereafter filed an action seeking class certification of the claim for punitive damages in all Dalkon Shield suits in the Eastern District of Virginia. *In re Dalkon Shield Punitive Damages Litigation,* 613 F. Supp. 1112 (E.D. Va. 1985). Certification was denied. The District Judge construed the decision by the Ninth Circuit Court of Appeals in *In re Northern District of California Dalkon Shield Products Liability Litigation, supra,* (693 F.2d 847), as having held that Rule 23(a) with its requirements of commonality, typicality and adequate representation were not met in the negligence and warranty claims for punitive damages against Robins and concluded that such decision barred under familiar principles of collateral estoppel this subsequent request for certification of the propriety of punitive damages awards in Dalkon Shield cases.

The final effort at maintaining a class action against Robins before the filing of the action which is the subject of this appeal

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[8] The District Court had found a "limited fund" where recovery of punitive damages in one case carried the risk of prejudicing the rights of other claimants to recover punitive damages on two facts primarily: (1) At the time there were 1,573 suits involving claims for compensatory damages of "well over $500 million", and (2) "[t]he potential for the constructive bankruptcy of A. H. Robins, a company whose net worth is $280,394,000, raised the unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress." In *In re Northern District of Cal, Dalkon Shield IUD Products Liability Litigation,* 521 F. Supp. 1188 at 1191 (N.D. Cal. 1981). As we note later, the idea that one seeking class certification under the limited fund doctrine must prove the inadequacy of the fund to be "inescapable" has been repudiated in other decisions. *See Bendectin,* 849 F.2d at 306, later discussed with extensive citation of other precedents.

occurred in early 1985. At that time counsel who later filed this action instituted in the District Court of Virginia a proposed class action against Robins. The complaint in that action included the same general allegations which had been made in earlier attempts at maintaining a class action in the Dalkon Shield litigation but added an important new averment. It alleged that at the time the action was filed, Robins was insolvent and that the value of outstanding claims, filed and unfiled, exceeded Robins' value, thereby exposing filing victims to economic prejudice at the hands of more timely filed claims. The action sought a gross judgment, the proceeds from which would be equitably distributed among Dalkon Shield claimants *under an alternative dispute resolution process*[9] Robins opposed the suit and denied insolvency. Though a hearing was had by the District Court on the motion for class certification, no order on that motion was issued prior to the filing by Robins of the Chapter 11 proceedings. The motion has remained dormant since.

III.

During the period of these proceedings before the Judicial Panel and the attempts at class certification as already detailed, the flood of suits against Robins by Dalkon Shield claimants had continued unabated. By 1985 "an average in excess of seventy (70) cases per week were being filed," usually seeking "both compensatory and punitive damages."[10] Moreover, large verdicts were being returned against Robins. Illustrative of that was a case in the same court before which the first verdict in a Dalkon Shield case in mid-1975 was returned. In 1985, with the same

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[9] It is interesting that at this early stage, counsel contemplated disposing of individual issues of causation and damages through a "dispute resolution" mechanism, the same procedure established in the Robins Plan of Reorganization and the *Breland* settlement, which we later discuss.

[10] *In re A. H. Robins Co., Inc.*, 89 Bankr. 555, 557 (E.D.Va. 1988).

counsel representing the plaintiff, a verdict of $9.1 million (of which $7.5 million was awarded as punitive damages) was returned against Robins. In short, beginning with an award of $85,000 in 1975, awards in the Dalkon Shield cases escalated by 1985 with verdicts such as this latest verdict to over $9 million. Such suits understandably were taking their toll on Robins' resources.

IV.

Under these circumstances, it was but natural that some Dalkon Shield claimants and their counsel would have become apprehensive of the ability of Robins to meet the liabilities being asserted in all the pending Dalkon Shield cases. Another "deep pocket" had to be sought and a number of the claimants focused on Aetna as this other "deep pocket." Various suits were begun prior to the filing or immediately after the filing by Robins of its Chapter 11 petition against Aetna charging liability on its part as a tortfeasor with Robins.

Typical of such suits was *Bast, et al. v. A. H. Robins Co., Inc.*, 616 F. Supp. 3 (E.D. Wis. 1985). In that case, the Dalkon Shield plaintiffs sought, in the words of the Court, "to impose direct liability for their injuries upon Aetna Casualty and Surety Company, the A. H. Robins Company's insurance carrier," under a claim that Aetna had, by its actions, made itself a joint tortfeasor equally liable as Robins. They alleged virtually the same substantive claims as did the plaintiffs in the case before us, to wit, negligence, express and implied warranty, misrepresentation and fraud, all garnished with a RICO claim. The Court found the complaint flawed because the plaintiffs had failed to "aver the existence of a duty of care owed the plaintiffs by Aetna, and resultant injuries proximately caused by such breach." 616 F. Supp. at 4. It, therefore, dismissed the action.

A few weeks after Bast was dismissed, and about a week before Robins filed its Chapter 11 petition, a similar case came before the District Court in the other district of the same state.

Campbell, et al. v. A. H. Robins Co., Inc., 615 F. Supp. 496 (W.D. Wis. 1985). The complaint in this action charged the same negligence, warranty, misrepresentation, conspiracy, fraud and RICO counts as had *Bast*. Aetna filed a motion to dismiss and the Court granted the motion. In dismissing the suit, the Court said that all the claims were "faulty for the simple reason that an insurer owes no duty of care to injured third parties under Wisconsin law." In the same vein, the court said that "there must be allegations of how a defendant may have breached such duties, and how the plaintiffs' injuries may have been caused by the defendant." 615 F. Supp. at 500 (citation omitted). It added too that "retrospective liability of co-conspirators does not operate to make the late-entering conspirator responsible for the already completed substantive offenses of his cohorts." *Ibid.* It dismissed the RICO claim as "deficient in two respects: the complaint does not allege a causal connection between the racketeering offenses attributable to Aetna and the injuries that plaintiffs suffered; and the complaint does not, and cannot, allege an injury to 'business or property' as required by 18 U.S.C. § 1964(c)." *Ibid* (footnote omitted).

Other suits against Aetna were filed seeking to charge it as a joint tortfeasor with Robins in the Dalkon Shield litigation. So far as we can ascertain, motions for dismissal in all such actions were filed by Aetna and, such as had been heard and ruled on, had been granted. *See Bathurst v. Aetna Casualty and Surety Co.*, No. 85-C-0324 (E.D. Wis. 1985) and *Dyes v. Aetna Casualty and Surety Co.*, No. C-85-3932A (N.D. Ga. 1985).[11]

V.

In addition to all these attempts at class action certification,

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[11] It was represented to this Court, without contradiction, that 144 of like cases had been filed against Aetna. Motions for dismissal were made in all of them by Aetna, Forty of the motions had been heard. Four had been voluntarily dismissed, and in the remaining 36, the trial court had granted the motion to dismiss, and that dismissal had not been appealed.

either total or partial, and attempted suits against Aetna, there had been a running dispute between Aetna and Robins on the extent of the coverage under Aetna's policy. This difference apparently existed from the very beginning of the Dalkon Shield litigation. In 1979 Aetna had filed a declaratory action to resolve some of these disputes and differences. In October, 1984, a settlement was agreed upon in this litigation after extensive negotiations. In a compromise settlement of the dispute, Aetna agreed, among other things, to provide a small additional coverage above its claimed limits of $300 million. By mid-1985, there was argument [sic] between Robins and Aetna over the amount of remaining liability, if any, under Aetna's policy available for payment of judgments entered in the Dalkon Shield litigation.

VI.

By this time, Robins had been frustrated in every effort to reduce the expenses of defending the individual suits being filed through the use of the class action device. The costs of defense, the disruption that all the individual trials was placing on its executive force, and the expense of discharging some of the judgments was putting great financial strain on Robins. Its funds had been so depleted by the suits that its unrestricted funds had been reduced to $5 million and "financial institutions were unwilling to lend it money." It had actually experienced considerable difficulty in collateralizing as a condition of appeal the judgment in the case where the plaintiffs had recovered in early 1985 a $9.1 million judgment. Faced with its obvious financial deterioration, a deterioration which gave every indication of accelerating, Robins felt its only avenue for paying equitably and fairly all the claims was through a Chapter 11 proceeding. So on August 22, 1985, Robins filed in the Eastern District Court of Virginia its Chapter 11 petition. By the time Robins filed this petition it and/or its insurance carrier had settled 9,238 claims for approximately $530,000,000. Despite these settlements, Robins, at the time it filed for relief, still faced over five thousand

pending cases in state and federal court. *In re A. H. Robins Co., Inc., supra,* 89 Bankr. at 557.

VII.

A few months after the Chapter 11 petition was filed, seven Dalkon Shield claimants, suing individually and as the class representative of all Dalkon Shield claimants, filed this action against Aetna *alone* to recover for the injuries allegedly suffered by them as a result of the use of the Dalkon Shield. The plaintiffs (hereafter often referred to as the *Breland* plaintiffs) asked at the outset of their complaint that the action be certified as a class suit on behalf of the whole class of Dalkon Shield claimants, which class they averred should be divided into two classes identified as Class A and Class B. Class A members were those claimants who had complied with all the requirements for proof as a claimant in the Robins bankruptcy proceedings, and Class B members were those who had failed so to comply. Alleging compliance with the prerequisites of Rule 23, they asked that the action against Aetna be certified as a class action against Aetna on behalf of both Classes A and B under Rule 23(b)(1)(A) and (B), without opt-out rights on the part of any member of either Class. They proffered allegations of justification for this action. They then separated their substantive claims into two categories. The first was characterized by them as their "Limited Fund Contract Claim." This claim related to Aetna's liability under its Robins policy. In 1984, after several years of haggling between Robins and Aetna, an agreement was reached which changed in some particulars Aetna's obligation under its policy to the prejudice of those entitled to avail themselves of rights under it. It was the premise of the *Breland* plaintiffs that the Dalkon Shield claimants were third-party beneficiaries under the policy and as such had a common, undivided interest in the value of the policy. They sought "vitiation" of this 1984 agreement between Robins and Aetna. This was the subject of the "limited fund" claim.

The second claim of the *Breland* plaintiffs was for recovery of damages against Aetna as a joint tortfeasor for all injuries sustained by the two Dalkon Shield Classes of claimants by reason of the use of the Dalkon Shield. The plaintiffs alleged as a basis for its charge against Aetna as a joint tortfeasor that from "the time the Defendant [Aetna] agreed to insure Robins and continuing up to the present, Defendant became an active participant in all stages of the development, testing, promotion, and marketing of the product as well as being inexorably involved in the palliation of the public and the medical profession." They followed with a statement of the same claims of liability under negligence, strict liability, express and implied warranty, fraud, and conspiracy plus the standard RICO averments that were becoming routine allegations in the suits filed by Dalkon Shield claimants against Robins.

In its answer to this complaint, Aetna admitted at the outset federal jurisdiction "over this action pursuant to 28 U.S.C.§ 1334(b) and 11 U.S.C.§105 because this action arises in and is related to *In re A. H. Robins Company, Inc. Chapter 11 Case No. 85-01307-R,*" and expressly conceded the accuracy of plaintiffs' allegations in paragraph 26 of their [the plaintiffs'] complaint, which was in these words:

> The class is severely prejudiced and adversely affected unless a single class action is permitted to be maintained in which class representatives under strict court guardianship are in a position to bind the class and Aetna in a unitary proceeding against Aetna. The equitable underpinnings for the certification of mandatory Rule 23(b)(1) class actions are satisfied under these extraordinary circumstances.

It added affirmatively in that connection "that Aetna [itself] would be severely prejudiced if forced to respond to multiple suits filed by class members. The application of incompatible standards to Aetna would impair Aetna's ability to engage in the

consistent, continuing course of conduct relative to its duties and obligations as an insurer."

On the merits of the claims, Aetna denied specifically all allegations of the complaint charging liability on its part along with Robins in the Dalkon Shield cases as a joint tortfeasor, stating affirmatively that

> Aetna's action and activities complained of by plaintiffs are based on Aetna's relationship with Robins as its insurer, and not on any direct conduct or contact between Aetna and any of the plaintiffs claiming injury from use of the Dalkon Shield. No action by Aetna caused any injury to any plaintiff as a matter of fact or of law.

It said in further explication of this defense that it was "neither a manufacturer nor a seller of the Dalkon Shield and, therefore, is not subject to strict liability."

VIII.

With the joinder of issues in the action, the plaintiffs moved promptly for class certification in accordance with the allegations of their complaint. The District Court heard such motion on October 30, 1986. In its order entered some weeks after the hearing, the court found that "the requirements for class action certification under Federal Rules of Civil Procedure 23 [had] been" met and it conditionally certified the action. However, consistent "with the Court's determination by [its] Order of November 4, 1986, to lift the stay in this action to permit Plaintiffs to proceed with discovery" and "to assure that the class will have the benefit of all such discovery," it made its certification "subject to further consideration in light of discovery developments, whether this action should continue to be maintained as a class action, and if so, in what form."

In the meantime, a number of Dalkon Shield claimants, by counsel, filed for leave to intervene at the hearing on the motion for final certification in order to oppose class certification. The

District Court granted the right to intervene for the purpose of filing briefs in opposition to class certification as well as "to present oral argument before the Court prior to the disposition of the class certification motion before this Court."

While the discovery was continuing under the District Court's order for conditional certification, the Official Dalkon Shield Claimants' Committee filed a motion with the District Court for leave to file its own complaint against Aetna. That motion was granted and the Committee proceeded to file its complaint. The Committee's complaint followed substantially the *Breland* plaintiffs' complaint on its broad claim against Aetna but it injected into the controversy an entirely new issue of considerable complexity. This additional allegation was that "[a]s a result of the joint negligence of Aetna and Robins, Aetna is liable to Robins for contribution for its pro-rata share of those damages already paid by Robins to Dalkon Shield users." Aetna responded to this complaint, admitting the insurance policy issued by it to Robins and that Robins had "expended in excess of $200,000,000 pre-petition with respect to Dalkon Shield claims"[12] but denying absolutely on a number of grounds any claim that it was a joint tortfeasor along with Robins in the Dalkon Shield case. It, too, added an affirmative claim of a right to a contribution from Robins in the event that it was found liable as a joint tortfeasor. This latter claim was stated in paragraph 20 of Aetna's answer to the Committee's complaint as follows:

> In the event, however, Aetna is liable to Robins for contribution or for other form of relief (all such liability being expressly denied by Aetna), then, as to any amounts which Aetna is required to pay to Dalkon

[12] It would seem that Aetna had paid already the full limits of its policy ($300 million), and Robins had paid over $200 million of its own funds in settlement of judgments or compromise. This explains why Robins had to advance the appeal bond in the last Kansas suit in which a $9 million deposit of bond was required (we referred earlier to this fact).

> Shield claimants (other than under the policies of insurance issued by Aetna to Robins) on account of injuries related to the Dalkon Shield, Robins is liable to Aetna for contribution as to all such payments to the extent based on conduct by Aetna found sufficient to give rise to a right by Robins to contribution.

This action of the Committee was consolidated with the *Breland* suit without objection and was disposed of in the orders granting certification and approving the settlement, all as subsequently discussed.

IX.

As discovery on the certification issue proceeded, considerable inquiry on the part of counsel for the *Breland* plaintiffs into all dealings between Robins and Aetna, including the files of Robins and those of Aetna, was conducted. At the same time, discussions of a possible settlement between the plaintiffs in *Breland* and Aetna were engaged in by counsel for the parties. The parties recognized that the *Breland* case and the Robins reorganization would necessarily involve some coordination if a feasible settlement were to be achieved. Such a coordination would require as an essential step a final class certification in the *Breland* case. To expedite certification, Aetna stipulated of record that "if Breland were certified, and if claims resolution in *Breland* could be coordinated with the claims resolution process which would be required in the Robins reorganization proceedings, [it] would agree not to litigate separately any of the non-common issues of individual medical causation and individual amounts of damages." This stipulation left open either for trial or for settlement the issue whether Aetna could be held liable as a joint tortfeasor with Robins; all other issues—the non-common ones of individual causation and damages—were to be resolved along with the similar claims in the Robins reorganization under a claims resolution procedure for the disposition of such claims.

A settlement figure on the common issue of Aetna's possible

liability as a tortfeasor was extensively discussed. The discussion ranged somewhere "between zero and $300 million in cash." However, it became "obvious," as the *Breland* counsel wrote Aetna's counsel, "that somebody is going to buy Robins," and, though the parties to the *Breland* suit had "agreed in principle to a solution," he (the *Breland* counsel) felt that any final attempt at settlement should "wait until we see what type of proposal is seriously made by a serious suitor that has a chance of becoming a feasible plan of reorganization prior to our finally resolving our lawsuit." When American Home Products Corporation (Home Products) later entered the picture as a "serious suitor" for Robins, the negotiations in the consolidated suits of the *Breland* plaintiffs and the Claimants' Committee and the discussions of a Plan of Reorganization of Robins, based primarily on an offer of American Home, began to merge and take shape, looking to a combined settlement of all Dalkon Shield litigation.

X.

While discussions had been proceeding between Aetna and the *Breland* plaintiffs, the parties in the bankruptcy reorganization of Robins had fortunately been working at the same time on a Plan of Reorganization. As a basis for any plan of reorganization it was necessary that an estimation be made of the unliquidated claims against the debtor under Section 502(c) of the Bankruptcy Code, which directs that "[t]here *shall* be estimated for purposes of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." An estimation under this section contemplates a full adjudication.[13] The estimation of the unliquidated claims in this case was

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[13] The process of estimation under the Bankruptcy Code is accurately explained in the Note, *The Manville Bankruptcy: Treating Mass Tort Claims* (con't.)

arrived at after testimony by expert witnesses, taken in a proceeding before the District Judge, where all parties were represented by counsel and had participated in the proceedings. The result of the hearing was an estimation made by the District Judge on the basis of the full record before him. The Dalkon Shield claims constituted substantially all the unliquidated claims involved in the estimation. The value of such unliquidated Dalkon Shield claims was fixed in the District Judge's estimation order at an "aggregate" dollar amount or value of $2.475 billion. The District Judge announced to all parties interested in

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in Chapter 11 Proceedings, 96 Harv.L.Rev. 1121 at 1128-29 and 1132-1133 (1983):

> The liquidation of contingent claims is governed by the estimation provision of the Bankruptcy Code, section 502(c). The term "estimation" is misleading insofar as it suggests a mere guess or a lack of procedure; estimation in bankruptcy can be a full adjudication. Normally, the process of estimating individual claims is carried out before the bankruptcy judge. The unusual nature of the *Manville* case, however, may permit the bankruptcy court to read section 502(c) in a way that would allow it to lift the automatic stay on outside litigation and leave the estimation of individual asbestos claims to other courts, as long as the bankruptcy court estimated Manville's total asbestos-related liability, placed a limit on that liability, and established a compensation fund for recovery by present and future asbestos claimants.
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> Under this reading, the bankruptcy court would estimate Manville's total liability by statistical means. It could employ epidemiological studies to determine the future incidence of asbestos-related disease, and then study the data from the 3500 claims against Manville that have already reached judgment or settlement to determine the average cost of each claim. The estimation of Manville's aggregate liability, a process entirely distinct from the estimation of individual claims, would not directly determine the recovery rights of any individual.
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> * * *

the reorganization that no plan of reorganization would be considered which failed to provide this amount for the full payment of all Dalkon Shield claims.

At this point the American Home Products Corporation (American Home) made an offer that gave promise of enabling the debtor to meet this requirement of the District Judge. It proposed a merger of Robins with a subsidiary of American Home, which, with the assistance of its parent company, would as an incident of the merger provide, among other things, a sum, which, supplemented with some other anticipated contributions would, provide a fund of $2.475 billion for the full satisfaction

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> The historical background and policy of section 502(c) support a reading that would permit the bankruptcy court to estimate only the aggregate of claims. The old Bankruptcy Act permitted courts to decline to allow claims "not capable of liquidation or of reasonable estimation" or whose liquidation or estimation "would unduly delay the administration of the estate or any proceeding under this Act." The new requirement that the court estimate all claims is one of many reforms in the Bankruptcy Code that are intended to implement the Code's broad policy of affording the debtor the most complete relief and the freshest start feasible by disposing of all possible claims during the bankruptcy proceeding. Congress wished to eliminate the possibility that after the completion of reorganization the debtor would still be faced with the uncertainty of contingent debts that could ruin the financial stability achieved in the reorganization proceedings. *Congress' goals would be achieved equally well by assigning a dollar value to the whole of the asbestos plaintiffs' claims as by assigning a dollar value to each individual claim.* In either case, Manville would exit from the reorganization certain of all of its liabilities and able to carry on its business without the fear that pending or future asbestos-related claims would endanger its financial condition. (Italics added).

For other discussion of the estimation process under 502(c), *see* 3 Collier on Bankruptcy, Para. 502.03, pp. 502-71 to 503-75 (15th ed. 1979); Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 Stan.L.Rev. 153 (1982).

of the unliquidated Dalkon Shield claims. One expected to make some contribution was Aetna. The reason for such inclusion was American Home's insistence that its contribution was contingent on a settlement by all Dalkon Shield claimants of their claims against any party. This insistence on American Home's part was a desire to assure the new company to be formed by the merger against any Dalkon shield liability. It may be that American Home felt that if Aetna were left out and Dalkon Shield claimants prevailed on its joint tortfeasor claim against Aetna, Aetna would acquire a right of contribution against Robins or its successor under the laws of a majority of the states.[14] American Home apparently demanded that the new company, Robins and American Home, be protected against that risk. It accordingly became clear to the parties in the bankruptcy,

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[14] In the majority of the states, especially in those states where the Uniform Contribution Among Tortfeasors Act has been adopted, the laws provide for contribution so that all tortfeasors are required to pay their fair share of the damages recovered. *See, e.g., Rabatin v. Columbus Lines, Inc.*, 790 F.2d 22, 25-26 (3d Cir. 1986); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1140-41 (5th Cir. 1985); *Greyhound Lines, Inc. v. Cobb County, Ga.*, 681 F.2d 1327 (11th Cir. 1982); *Raisler v. Burlington Northern Ry. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Rowland v. Skaggs Companies, Inc.*, 666 S.W.2d 770 (Mo.1984) *(en banc)*; *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982); *Petersen v. Tolstow*, 184 N.J. Super. 84, 445 A.2d 84 (1982); *Schauer v. Joyce*, 54 N.Y.2d 1, 429 N.E.2d 83 (1981); *Blackledge v. Harrington*, 291 Or. 691, 634 P.2d 243 (1981). This rule regarding contribution can apply even where the liability of the parties rests on different grounds. *Monsen v. DeGroot*, 130 Ill. App.3d 735, 475 N.E.2d 5 (1985), *aff'd, Hopkins v. Powers*, 113 Ill.2d 206, 497 N.E.2d 757 (1986); *Florida Farm Bureau Cas. Co. v. Batton*, 444 So.2d 1128 (Fla. Dist. Ct. App. 1984); *Wolfe v. Ford Motor Co.*, 386 Mass. 95, 434 N.E.2d 1008 (1982). Moreover, the provision for contribution can arise whether the other tortfeasor is sued or not. *Greenemeier by Redington v. Spencer*, 694 P.2d 850 (Colo. Ct. App. 1984), *aff'd*, 719 P.2d 710 (Colo. 1986) (*en banc*).

(cont'd)

as it had to the parties in the *Breland* case, that the negotiations for settlement of the suit of the *Breland* plaintiffs and of the Claimants' Committee had to be merged into a comprehensive procedure for the liquidation of all Dalkon Shield claims against Robins and Aetna. This made it essential that the settlement of the *Breland* case be tied to the Plan of Reorganization of Robins, and that is what the parties in the two proceedings did.

The procedure adopted to achieve this merger of the *Breland* action and the Plan of Reorganization of Robins began with the formulation of what was intended as the Final Plan of Reorganization of Robins. This Plan of Reorganization contemplated the creation of a Trust Fund to consist of $2.475 billion, to be funded primarily by payments made by American Home in connection with its acquisition by merger of Robins and by contributions of

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A dwindling minority of jurisdictions does, however, continue to deny contribution among joint tortfeasors. *See, e.g., Gray v. City of Kansas City, Kan.*, 603 F. Supp. 872 (D. Kan. 1985); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). Even of this limited number, however, some states have, by statutes recently enacted, legislated contribution. *See, e.g., Holcomb v. Holcomb*, 70 N.C. App. 471, 320 S.E.2d 12 (1984); *Jaswell Drill Corp. v. General Motors Corp.*, 129 N.H.341, 529 A.2d 875 (1987). This legislation can further complicate actions for contribution. Ordinarily, the substantive right of contribution is determined by the law at the time of the tort and not by the time suit may be filed; in short, if right of contribution is created by statute, the right is normally prospective and does not apply to torts which occurred earlier. *Korn v. G. D. Searle & Co.*, 81 Bankr. 1 (D.N.H. 1987); *Glass v. Stahl Specialty Co.*, 97 Wash.2d 880, 652 P.2d 948 (1982). We note, too, that there may be many claims [sic] which [sic] under Claims Resolution Facility procedure may elect to have a trial, the venue of which may not be in the courts of Virginia. In these cases, the appropriate law of contribution or apportionment will be determined by the rule in the state in which such cases would be tried. There would accordingly be a real risk of conflicting decisions on apportionment and contribution. Fortunately, the Settlement in this case and the Plan of Reorganization in the Robins Chapter 11 proceedings, if approved, remove this issue as a problem.

Aetna.[15] Since it was manifest that Robins' liability in the Dalkon Shield litigation was direct while that of Aetna's liability as a possible joint tortfeasor was rather tenuous, if at all, the contribution of Robins through its merger with American Home's subsidiary and that of Aetna would vary markedly, and it did. The contribution of Aetna was to consist of a net of $75 million and of four policies of insurance, one of which was to be in the total amount of $250 million to be used "in the event there [were] not sufficient funds of the Trust (including investment income] to make further payments on claims" and the other to consist of an approved policy or policies of insurance in the amount of $100 million to pay Class B claimants whose claims were "ineligible for such recovery on a nonsubordinated basis." Aetna was to pay the premiums on all such insurance. Upon the approval of the Plan of Reorganization and the Certification and Settlement in the *Breland* suit, and the payments and transfers of insurance contracts to the Trust Fund required under the Plan and Settlement, the claims of all Dalkon Shield claimants against both Robins and Aetna were to be converted into claims solely against the Trust Fund established to pay in full their claims as proved under the procedure provided in the Plan, and Robins, Aetna and American Home and a successor company and the individuals contributing to the fund were to be released absolutely from any liability to Dalkon Shield claimants.

The Trust itself was to be operated by five trustees named in the Plan. The trustees were to create a Claims Resolution Facility which would resolve the liability due to each Dalkon Shield claimant. The issue of liability in each case would be resolved, if possible, by negotiations between the Facility acting for the Trust and the claimant and her attorney, if she had an attorney.

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[15] There were to be some minimal contributions by several individuals who were officers and directors of Robins. These individuals were to be included in the settlement.

If resolution of the claim could not be accomplished through negotiation, then the claim in every case would be resolved either by binding arbitration or by a jury trial at the option of the claimant. Should any claimant elect to settle her claim by suit, venue of such trial "[would] be unchanged by the Chapter 11 case" and the "right to a jury trial [would] be preserved," with "[a]ll claims and defenses . . . available to both sides in a trial." *See* Exhibit Vol. III, pp. 1952-53.[16] Under Aetna's stipulation, already described, this provision meant that questions of individual causation and damages in both the Robins bankruptcy and in the *Breland* case would be resolved by the above proceedings.

XI.

Considerable testimony was taken—much of it before the District Court itself—on the propriety of certification and of the Settlement. The parties' in interest engaged in extensive cross-examination of the witnesses in the various proceedings. A full record of such proceedings is included in the Joint Appendix herein. Some of the records considered in the matter were made before the Claimants Committee's action was filed, but a great part was after that filing. In addition, the discovery developed as a result of the proceedings before Judge Lord as well as the report of the masters appointed by Judge Lord in that proceeding was made a part of the record. Moreover, the masters testified in person in connection with their investigations and reports. At the conclusion of the receipt of testimony and admission of exhibits,

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[16] On punitive as distinguished from compensatory damages, the Plan of Reorganization provided that

> any portion of any Dalkon Shield Claim that is a Claim for punitive damages is a Disallowed Claim; provided, however, that holders of Dalkon Shield Claims subject to the Claims Resolution Facility are entitled to receive from the Claimants Trust any sums payable in lieu of punitive damages pursuant to the Claims Resolution Facility.

Article VII, 7.02(a)(iv), Exhibit Vol. III, p. 1920.

lengthy arguments of counsel both for and against certification and of the Settlement were heard by the District Court.

On the basis of the record and the arguments, oral and written, by the parties, the District Court made its findings and conclusions separately on both the motion for class certification and the motion to approve the Settlement. It is essential in reviewing these decisions to remember that we are reviewing two decisions, both made substantially on the same factual record but dealing separately with the different issues in the two appeals. However, before we discuss the two appeals on their merits, we must address a jurisdictional issue, which, if upheld, would require the dismissal of the entire action.

XII.

The appellants have raised a threshold claim that this action fails the jurisdictional test established for a diversity action in federal court. The jurisdictional flaw is said to be the failure of the action to meet the jurisdictional amount test under 28 U.S.C. § 1322.[17] The appellants base this contention on *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973), in which the Supreme Court said that "[e]ach plaintiff in a Rule 23(b)(3) class action ... must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." We address this jurisdictional issue first, as we should.

Unquestionably, all the named plaintiffs in this case meet the jurisdictional amount test for federal diversity jurisdiction. Each plaintiff alleges a claim in excess of $10,000.[18] Such an allegation was sufficient at the time to establish jurisdiction. *St.*

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[17] The argument disregards Aetna's contention that jurisdiction exists under Section 1334(b) and Section 3105 of the Bankruptcy Code. We, however, find no need to address these alternative grounds for jurisdiction since we are of the opinion that jurisdiction properly attaches under Section 1332.

[18] This was the jurisdictional amount when the suits were filed.

Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). But it is the appellants' construction of *Zahn* that not only must the named plaintiffs in a proposed class action suit meet the jurisdictional amount but that all unnamed class claimants must likewise do so. Under this argument, it would be necessary to find on the record that the 300,000 Dalkon Shield claimants met the jurisdictional test. We do not understand, however, that the appellants assert that the plaintiffs herein must establish by direct proof that the claims of the unnamed class members meet the jurisdictional amount, nor would prevalent authority sustain such contention, if made. The courts which have considered the jurisdictional amount requirement in the mass tort class action context have ruled that the court will dismiss on this ground only if it can be said "to a legal certainty" that the claims of the unnamed claimants fail the jurisdictional amount test. This was the decision of the court in the first decision to address this point in a mass tort case, the decision which is generally regarded as the guiding authority in this connection. *Payton v. Abbott Labs.*, 83 F.R.D. 382, 395 (D. Mass. 1979).[19]

Payton, on its facts, has striking similarity with this case. It involved claims by a class of women suing for injuries caused by exposure to diethylstilbestrol (DES), manufactured and sold by the defendant pharmaceutical manufacturer. The defendant objected to class certification on the ground "that members of the plaintiff class [did] not satisfy that [the jurisdictional amount] minimum and that, in the context of this action, separating members of the class who meet the jurisdictional minimum from those who do not is impossible."[20] The Court, in deciding the

[19] This decision was modified on a point unrelated to that which is relevant here. 100 F.R.D. 6 (D. Mass. 1983).

[20] The last portion of this sentence is a literal application of *Zahn*, which did not order the dismissal of the action in that case on jurisdictional grounds, but ordered only the dismissal of those class members who did not meet the jurisdictional amount.

issue in that case, looked first to *St. Paul Indemnity*, which had said that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal" for want of the jurisdictional amount, 303 U.S. at 289, and, applying that principle, denied the motion of the defendant to dismiss, saying

> Plaintiffs' claimed damages are unliquidated and subject to a jury's evaluation of many subjective factors. I cannot now find to a legal certainty that the claim of any member of the plaintiff class is less than the jurisdictional amount. 83 F.R.D. at 395.

In *In re No. District of Cal. "Dalkon Shield" IUD Products*, 526 F. Supp. 887, 910-911 (N.D. Cal. 1981), in which there was, as we have said, a class certification of Dalkon Shield claimants, the District Court apparently *sua sponte* noted that it might be argued in denial of jurisdiction as do the appellants here that "each class member, named or unnamed" may not have a claim meeting "the amount in controversy requirement." The court, however, dismissed such possible jurisdictional objection. In so doing, it relied, as did *Payton*, on *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938), with its rule requiring a finding of "legal certainty" for its dismissal of the jurisdictional issue. On appeal, the decision of the District Court on the merits was reversed, but the appellate court did not disapprove of the jurisdictional ruling made by the District Court. That court did not even notice the point in its decision, even though the District Court in its opinion had ruled on the point. In fact, it is not clear from the opinion that the appellants even raised the point. In any event, since this jurisdictional defect, if sound, would have made unnecessary consideration of the other points on appeal and should have been considered by the Court *sua sponte* if of merit, it seems safe to assume that the Court of Appeals agreed with this part of the District Court's ruling. *See In re No. District of Cal, "Dalkon Shield" IUD Products*, 693 F.2d 847 (9th Cir. 1982),

cert. denied, 459 U.S. 1171 (1983), *cert. denied*, 459 U.S. 1171 (1983).

In *In Re Agent Orange Prod. Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 695 (1988), which was a class action suit on behalf of all former servicemen claiming injuries as resulting from the use of Agent Orange by the military forces in Vietnam, the same question arose whether the plaintiffs class satisfied the standard established by *Zahn*. In answering this question, the court noted the rule in *St.Paul Mercury Indemnity* to which we have already referred. It applied that rule and dismissed the point with this statement:

> Appellants do not argue that any class members made bad faith damage claims. Nor do they offer us any basis for determining whether such claims clearly are for less than the jurisdictional amount. Instead, they claim the District Court failed to carry out an obligation to police the damage claims. No such affirmative obligation exists, however, absent some apparent reason to make inquiry. Plaintiffs made what must be assumed to have been good faith allegations that each of them was entitled to at least $10,000 in damages. Defendants did not challenge the *bona fides* of these claims, and the District Court thus had no reason to inquire further.

The author of the Note, *Federal Mass Tort Class Actions: A Step Towards Equity and Efficiency*, 47 Alb.L.Rev. 1180, 1189-90, n.36 (1983), suggests as the proper rule to be applied in the mass tort situation that the action will be permitted to proceed against a jurisdictional amount challenge if the class plaintiffs themselves all meet the jurisdictional amount requirement since it "would be consistent with the rule that once federal jurisdiction in a class action has been fixed by the parties of record, subsequent intervenors do not need to meet the jurisdictional amount." *Ibid.*, 1190 n 36. This rule would not be inconsistent with the

literal reading of *Zahn*, since that decision said simply that, if any class member's claim was less than the jurisdictional amount, that class member's claim should be dismissed. However, it is not necessary to go this far in order to dispose of this challenge to the maintenance of the action herein. Applied as it was by the court in *Payton* and the other cases, *St. Paul* clearly sustains jurisdiction here. Thus, there have been countless suits, both in federal and state courts, to recover for injuries caused by the use of the Dalkon Shield. So far as a hasty review of the reported cases has indicated, not one suit has been filed in which the plaintiff sought less than the then jurisdictional amount. In the face of such a record, it would appear to be indisputable that it cannot be said to a "legal certainty" that the jurisdictional amount herein was not satisfied. We accordingly dismiss appellants' claim of lack of jurisdictional amount herein under *St. Paul Mercury Indemnity*.

XIII.

We turn now to the challenge of the certification order. This order was issued in what is emerging to be one of the most difficult management problems confronting the courts today, particularly federal courts, *i.e.*, that posed by the mass tort suit. Mass tort suits are generally divided into two classes. Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 Alb.L.Rev. 1180, 1183 (1983); 3 *Newberg on Class Actions*, §17.21, pp. 394-47 (2d ed. 1985). The first is concerned with what is designated as the mass accident suit, in which a large number of persons are injured as a result of a single accident. A familiar instance of such a tort is an airplane crash or the failure of a building as in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 342 (1983). The other type of mass tort action, of which this case is an outstanding example, is one arising out of the sale, on a national or international market to thousands of persons, of an alleged

defective product, the use of which has caused many persons to have suffered injury. In some of these products liability cases, the number of persons involved may be enormous. The potential plaintiffs, in this case, for instance, is in the hundreds of thousands. In most instances, this type of mass tort may well generate far more cases than the normal accident type.

Within recent years, the proliferation in the development and distribution of new products and remedies and the complaints of injuries from the use of these products have brought an accelerating avalanche of mass products liability suits primarily in federal courts which represents what is, as we have already observed, probably the most important and difficult management problem facing the federal court system today. Professor Seltzer has well summarized the size of the problem:

> Mass tort litigation in the 1980's has reached unprecedented levels. Thousands of personal injury lawsuits have been filed against manufacturers of such mass-marketed products as asbestos, formaldehyde, diethylstilbestrol (DES), Agent Orange, automobiles, tampons and intrauterine contraceptive devices [IUD's].[21]

The Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1)*, 96 Harv.L.Rev. 1143 (1983), is to the same effect:

> Mass accidents are a recurring phenomenon of modern technological society, It is not unusual for hundreds or thousands of injuries to be caused by a sudden event— an airplane crash or a structural building failure—or by a product defect in a widely used drug. Victims typically seek redress for such injuries by initiating individual suits. As a result, the judicial system becomes crowded with multiple claims concerning

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[21] Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing The Problems of Fairness Efficiency and Control, 57 Fordham L.Rev. 37, 37-38 (1983).*

> one basic course of conduct, with each victim seeking to maximize his own recovery and each defendant attempting to reduce his potential liability. As each party acts to further a narrow perception of his own best interests, the collective interests of the parties, society, and the judicial system may be ignored. *Ibid.* (footnote omitted)

The burden on the courts that these mass torts imposes and the tremendous public and private costs arising from the endless trials of the same issues in repeated court actions covering the same facts in great detail are illustrated by a recent analysis of only one aspect of the cost of such litigation to the parties in the *Agent Orange* mass tort litigation:

> By way of illustration, in the Agent Orange litigation, solely with respect to the government contract defense, the defendants took more than 200 depositions of former or current government employees. Assume that the depositions were performed by outside counsel and that each deposition took two days. Assume that the defendants' counsel each spent one day preparing for each deposition and another day summarizing and reviewing. Assume that the law firms used teams of two attorneys with an hourly billing rate for each attorney of $150. The calculation begins with: 200 depositions x 4 days x 8 hours = 6400 hours, The next step is 6400 hours x 14 attorneys (2 for each defendant) x $150 per hour = a total cost for attorneys of $13,440,000 for deposition costs for this aspect of the suit, leaving out transcript fees, travel costs, and other expenses. This cost would be multiplied several times over in the taking of depositions of

> the plaintiffs, the defendants, their physicians, and expert witnesses.[22]

Judge Rubin of the Fifth Circuit, in an article titled *Mass Tortsand Litigation Disasters*, 20 Ga.L.Rev. 429, 430 (1986) has said:

> These mass tort claims have a number of similarities: they result in the filing of many suits; they produce high litigation costs; they are generally resolved only after great delay; they affect not only the litigants but other users of the court system; and their total human and economic costs affect all of society.

Judge Rubin then reviewed one example of such mass torts, *i.e.*, the asbestos litigation and made this comment based on a Rand Corporation report:

> Asbestos litigation [for instance] has resulted in far more expense than in recovery of damages for injured persons. A Rand Corporation study estimated that injured persons receive less than thirty-seven percent of the total amount spent on litigation. Almost two-thirds of the total expenditures are for attorneys' fees and other litigation expenses.

When account is also taken of the toll of such cases on the court system itself, it is evident that the proper functioning of the courts and the fair and efficient administration of justice for other litigants whose right to a judicial determination are inevitably delayed inordinately by the clogging of the court system by mass tort actions tried individually and the societal costs of the endless repetition of them in trials at substantial costs to the judicial system, means that a mechanism for deciding expeditiously, efficiently and relatively inexpensively these actions without the delays of individual suits is demanded. This demand has been

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[22] Sand, *How Much Is Enough? Observations in Light of the Agent Orange Settlement*, 9 Harv.Envtl.L.Rev. 283, 297-98 (1985).

well pointed up by one of the recent groups of mass tort suits. In *In re Bendectin Products Liability Litigation,* 102 F.R.D. 239, 240 (S.D. Ohio 1984),[23] Judge Rubin, commenting on the waste of judicial time involved in individual disposition of one mass tort products case estimated that "[f]or the identified . . . cases, a full trial on each would probably require at least 30 trial days. Two *Bendectin* cases have already been tried. One required two trials of 44 and 45 days each. The other required 20 trial days. Assuming 200 trial days available per year per Judge, disposition of the present *Bendectin* cases at the trial level alone might require 21,000 trial days or the equivalent of 105 Judge years, *i.e.*, one Judge for 105 years or 105 Judges for one year." *Ibid.*, at 240 n. 3.

There is no clearer statement of the critical situation in the operation of the judicial system created by the mass tort litigation explosion than the language in a recent article coauthored by the lead counsel for the appellants in this very case:

> The public is crying out for better solutions to mass tort litigation than separate, redundant trials in thousands of related cases. Why should hundreds, or even thousands, of trials take place in which the same issue of a defendant's liability is litigated over and over again? Why should some plaintiffs recover compensatory and punitive damages, while other plaintiffs in other trials recover much less, or nothing at all, even though the issues of liability and causation are the same? Why should a defendant be put to the expense of parading the same witnesses on the stand in hundreds of different trials to demonstrate over and over

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[23] This suit was reversed on grounds later discussed herein. 749 F.2d 300 (6th Cir. 1984), The graphic description by Judge Rubin of the tremendous cost to the judicial system of the mass tort suits, tried separately, is not disputed, however.

> again the same evidence that its product was correctly designed and engineered? Is it fair that defendants are exposed to multiple punitive damage claims?

Panzer & Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 Tort & Insurance Law Journal, 560, 561 (1986).

The class action, it would seem, is the manifest fair and expeditious procedure for disposing of the mass tort litigants. It has been for years the recognized procedure for dealing with cases which have a marked similarity to those flowing from mass torts. The class action was judicially developed first in the equity courts and later accepted and applied by the law courts. Drawing on English and state procedural decisions, the Supreme Court over a century ago stated in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853) and restated later in *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 672 (1915) and *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940) the circumstances justifying the use of such procedure in federal court proceedings. In *Hansberry*, that court declared that the class action device was an "invention [or innovation] of equity [designed] to enable . . . [the court] to proceed to a decree in suits [or judgment] where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." To the same effect, *see General Telephone Co. of Southwest v. Falcon*, 457 U.S, 147, 155 (1982). In *Falcon*, the Supreme Court said:

> The class action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-701. Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Id.*, at 701.

The procedure to be followed by a federal court in such a case

is now embodied in Rule 23 of the Federal Rules of Civil Procedure as adopted in 1938. The formulation of the practice in this Rule was intended to embody the standards and purposes substantially already established in the federal decisions beginning with *Smith.*[24] Rule 23 was revised in 1966 in its present form but without change in its purpose. It would seem reasonable to assume that the Rule was intended to be applied with the same flexibility and in the same spirit of "invention" as earlier prompted the adoption of the procedure. We accordingly turn to a review of the Rule itself as well as of the decisions which have applied it in cases such as mass tort suits or similar suits.

XIV.

Under the Rule, certification of a class action, whether a mass tort action or not, requires that the action meet the requirements of a two-step test. As a first step, an action must satisfy all *four* of the prerequisites mandated by subsection (a) of the Rule. These requisites are: (1) numerosity of parties; (2) commonality of legal and factual issues; (3) typicality of the claims and defenses of the class representative; and (4) adequacy of representation. Assuming qualifications under (a) have been met, the next step demands that the action fit within at least one of the three categories of actions identified in subsection (b) of the Rule. An action may qualify under (b)(1), the first of such categories, "if individual adjudication of the controversy would prejudice either the party opposing the class, (b)(1)(A), or the class members themselves, (b)(1)(B)." *Zimmerman v. Bell,* 800 F.2d 386, 389 (4th Cir. 1986); *Intern. Woodworkers v. Chesapeake Bay Plywood,* 659 F.2d 1259, 1269 (4th Cir. 1981). Subsection (b)(2) covers suits for injunctive or declaratory relief. The final category, (b)(3), applies where there are common issues of law or fact and the class action device has superiority over any

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[24] *Smith v. Swormstedt, supra,* 57 U.S. (16 How.) 288 (1853).

other available procedure for disposing fairly and efficiently of the controversy.

Though not specified in the Rule, establishment of a class action implicitly requires both that there be an identifiable class and that the plaintiff or plaintiffs be a member of such class. 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure:* Civil 2d § 1760, pp. 115 *et seq.* (2d ed.1986); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976). Moreover, often an action may qualify under both (b)(1) and (b)(3). In such a situation, certification is to be made under (b)(1). 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure:* Civil 2d § 1772, 425 (2d ed. 1986); 38 Moore's Federal Practice,¶ 23.31[3], p. 236 (1987 ed.); *Robertson v. National Basketball Ass'n.*, 556 F.2d 682, 685 (2d Cir. 1977); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976); *Meyer v. Citizens & Southern Nat'l Bank*, 106 F.R.D. 356, 363 (D.Ga, 1985). The rationale for such decision is stated by *Moore* thus:

> If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2), rather than under (b)(3), so that the judgment will have *res judicata* effect as to all the class (since no member has the right to opt out in a (b)(1) or (b)(2) suit), thereby furthering policy underlying (b)(1) and (b)(2) class suits.[25]

Too, if the action includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims from other claims in the action and certify them under the provisions of subsection (c)(4). *See* 1 *Newberg on Class Actions*, § 4.20, pp. 310-1 (2d ed. 1985). This subsection provides that "an action may be maintained as a class action as to particular issues only. . . . Two or more issues, for instance,

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[25] 3 B Moore's Federal Practice, ¶ 23.31[3], pp. 236-237 (2d ed. 1987).

may be represented in a single action." Among such separate issues, for instance, may be a "limited fund" in which all members of the class have a common interest: such a class is recognized in the Comments of the Advisory Committee as qualifying under subdivision (b)(1)(B). *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 306 (6th Cir. 1984) ("The District Court was therefore not clearly erroneous as a matter of law to hold that a limited fund is a justification for a class action under a Rule 23(b)(1)(B)"); *Coburn v. 4-R Corp.*, 77 F.R.D 43, 45 (E.D. Ky. 1977); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561, n. 8 (S.D. Fla. 1973), *aff'd without opinion*, 507 F.2d 1278 (1975). However, to repeat: each subclass must independently meet all the requirements of (a) and at least one of the categories specified in (b). *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.2d 959, 961 (8th Cir. 1985). Moreover, when an action is certified under (b)(1), whether (A) or (B) or under (b)(2), all party members become mandatory class members without any opt-out rights, *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); if certified under (b)(3), however, any class member may opt out. The burden of establishing that a case meets the requirements for class certification under the Rule rests on the party seeking certification. *Davis v. Romney*, 490 F. 2d 1360, 1366 (3d Cir. 1974). The assessment required for a certification, though, is the responsibility of the District Court, which is to make its decision after "a rigorous analysis" of the particular facts of the case. The "District Court has wide discretion in deciding whether or not to certify a proposed class," and its decision may be reversed "only for abuse of discretion." *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986).

XV.

After the Rule was approved, the early view was that Rule 23 should be given "a liberal rather than a restrictive interpretation." *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555,563 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974); *Moss v. Lane Co.*, 50 F.R.D. 122, 125 (W.D. Va. 1970), *aff'd in pertinent part*, 471 F.2d 853 (1973). The decisions on the proper standard of construction under this view was that "if there is to be an error made, let it be in favor and not against the maintenance of the class action," *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061-62 (8th Cir. 1975). But despite the clear mandate in the first Section of the Rules that such Rules "[should] be construed to secure the just, speedy, and inexpensive determination of every action," some courts decided to depart from this liberal construction of Rule 23 and to adopt a standard of construction of the basis of the standard of "strict scrutiny." *Roby v. St. Louis Southwestern Ry. Co., supra*, 775 F.2d at 961. The reason for this departure from the liberal and flexible construction of Rule 23 and for the adoption of the "strict scrutiny" standard was stated in *La Mar v. H & B Novelty & Loan Company*, 489 F.2d 461, 468 (9th Cir. 1973). In that case, the Court based its strict construction of the Rule on its "belief that *restrictions on the flexible language of Rule 23 [was] a necessary contribution to the effort to avoid the intractable Problems of massive class actions and to maintain a wholesome degree of difference between the judicial and administrative functions*" (Italics added).[26] It declared that such construction was one "of prudence and caution" in line with what it declared was the "tone of the Advisory Committee's Note" referring to the Advisory Committee's Note on Rule 23(b)(3). 489 F.2d 465, 466.[27] The

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[26] It is manifest in the language of the case that the court recognized that the language of the Rule itself provided a "flexible" standard, which could respond to changing conditions in the litigation area.

"belief" that the class action procedure should be sharply reined in prompted the court which decided *La Mar* later to create two rules intended to accomplish this purpose of constraining the use of the class action device. It is important to remember that neither limitation, designed purposefully to hobble the use of the class action device, found justification in the language of the Rule itself; these limitations were judicially imposed to justify a constrained use of the Rule mistakenly adopted in the belief that

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[27] This departure by some courts from the earlier liberal application of Rule 23 has been well described in 7A C. Wright, A. Miller & M. Kane, *supra*, § 1754 at 52-54:

> The years since amended Rule 23 took effect have revealed that the notion that the courts should adopt a liberal attitude toward the certification of class actions has undergone some change. As problems in managing class actions began to surface, the courts began to construe the requirements of Rule 23 more strictly in order to reduce the number of class actions (*citing La Mar v. H & B Novelty & Loan Company*, as an example).
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> . . . .
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> Much of this restrictive attitude can be traced to mounting criticisms lodged at class actions. Unfortunately, much of that criticism was made without any information supporting it. Thus, various empirical studies were undertaken in order to better evaluate both the successes and failures of current Rule 23. Somewhat interestingly, one study, carried out for the United States Senate Commerce Committee revealed that many of the claimed abuses and problems caused by class actions for damages actually occur in only a small percentage of the cases.
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> . . . .
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> Class actions now appear to be moving into a third and more enlightened stage in which the courts, aware of the difficulties inherent in class relief, carefully scrutinize the cases for compliance with the requirements of Rule 23; they are not content merely to certify an action as a proper class suit and then suggest that all the problems raised by the parties may be adjusted or handled at a later stage. At the same time, however, the requirements are construed in light of the objectives of the rule—to provide for the expeditious handling of disputes and to allow a remedy for those for whom it would be unrealistic to expect to resort to individual litigation.

the manageability of mass tort litigation was beyond the resources of the courts. The first of the limitations found expression in *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976), where it was held that suits for damages were not appropriate for class action certification.[28] It *cited* in support of this principle *La Mar, supra,* which in turn had relied in large part on this statement in the Advisory Committee's Note on (b)(3):

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action con-

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[28] *Newberg on Class Actions* has properly criticized this limitation:

> Some courts have gone further and have held that Rule 23(b)(1)(A) was not designed to encompass class suits that seek damages relief. Such a limitation not only is unsupported in the language of the subdivision but also is contrary to the prevailing precedents which construe the various class categories of Rule 23(b). This construction of Rule 23(b)(1)(A) has been generally rejected or not followed by prevailing precedents. Moreover, cases in which the plaintiffs are seeking recovery from a limited fund readily qualify under Rule 23(b)(1)(B) and commonly qualify also under Rule 23(b)(1)(A).

1 *Newberg on Class Actions*, Section 4.04, pp. 276-77.

We have in two earlier cases taken note of this limitation in the use of Rule 23, but we have never based our decision in any case on such limitation. Thus, in *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594 (4th Cir. 1976), we were only concerned with whether a damage suit could qualify under (b)(2), which relates to declaratory or injunctive action. We, however, expressly chose not to decide the case on that point. *See*, 538 F.2d at 596. In *Zimmerman v. Bell*, 800 F.2d at 389, we said that Rule 23 is "not normally posed by a request for money damages." This was merely a dictum without actual relevance to the decision in that case.

ducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

For its second limitation, it held in *McDonnell Douglas Corp. v. U.S. District Ct., C.D. of California*, 523 F.2d 1083 (9th Cir. 1975), that the fact that one judgment in favor of one plaintiff in a mass tort situation and a judgment against the plaintiff in another suit in the mass tort situation would not be the type of inconsistency referred to in Rule 23(b)(1)(A).[29]

It is evident that these cases which have sought to circumscribe drastically the courts in the use of the class action device find their rationale in the Advisory Committee Note on (b)(3) of

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[29] *Newberg on Class Actions* also comments on this limitation:

> The most commonly used and accepted limitation on Rule 23(b)(1)(A) is that this subdivision was not designed to cover class situations where some members recover and others do not. The rationale is that such application of Rule 23(b)(1)(A) would be too broad. Because they speak in terms of recovery for members, presumably these decisions are referring to damages or monetary recovery, though injunctive and equitable relief can be part of a class member's recovery in a broad sense. In any event, carried to its logical end, this articulated limitation could conceivably be construed as precluding the application of Rule 23(b)(1)(A) in virtually every situation. More likely, courts invoking this limitation are saying that if Rule 23(b)(1)(A) is properly going to be applicable, there must be present some discrete, usually inarticulated, circumstances, but the court will not invoke this subdivision simply because separate actions may reach different results which will affect the right of individual litigants to recover.

1 *Newberg on Class Actions*, Section 4.04, pp, 276-77

See also 96 Harv.L.Rev., *supra*, at 1154-55 criticizing the placing of this construction on the use of (b)(1)(A):

> Two goals of tort law should be predictability and uniformity. As a practical matter, until the legality of a particular course of conduct has been adjudicated, potential defendants are guided only by a general standard, such

(con't.)

Rule 23 for their result. That Note was written in connection with the 1966 version of the Rule. Since that time, it has become recognized that the reluctance to use class actions in mass tort cases, as stated in cases such as *La Mar* and its progeny, represents an unnecessary limitation on the efficient case management in federal courts of mass torts. As a consequence of this changed attitude, commentators have expressed their dissatisfaction with the constraints which the Advisory Committee's Note and the decisions of the Ninth Circuit would place on the use of Rule 23 in the mass tort context. Thus, *Newberg on Class*

> as "reasonable conduct," and by analogous cases decided under that standard. What may appear to be inconsistent adjudications in similar situations can generally be rationalized because of differences in the facts. But if various fact finders reach inconsistent conclusions about the same set of facts, the defendant (and others in similar circumstances) is left without any guidance concerning the legality of its conduct, which may serve important legitimate aims. To be sure, the loss of guidance may be less problematic than being ordered by two courts to perform simultaneous conflicting tasks. But defendants and plaintiffs alike have compelling interests in consistent liability determinations, interests that can and should be addressed. Therefore, certifying (b)(1)(A) classes to promote these interests, even in cases in which there is no danger of conflicting equitable decrees, is fully compatible with the language and policy of the rule.

See also the Court's comments *In Re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), where the Court commented that the inconsistency in verdicts in a mass tort context made litigation look "more like roulette than jurisprudence," *Ibid.*, 1001 n. 3, and "[t]he asbestos litigation [in particular] often resembles the casinos 60 miles east of Philadelphia, rather than a courtroom procedure." *Ibid.*, 1001.

Actions states:

> Mass torts in modern-day jurisprudence are taking a fresh look at the value of Rule 23 class actions. The economies of time, effort, and expense of the class device cut across categorical tort lines and ought not to be obscured by the narrow application of circumstances or by undue emphasis on traditional interests in one-to-one litigation.
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> I was an ex officio member of the Advisory committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true, I am profoundly convinced now that that is untrue.Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challange of the mass repetitive wrong that we see in this case and so many others that have been mentioned this morning and afternoon.

[Quoting from Statement by] Prof. Charles Alan Wright *In Re: School Asbestos Litigation* Master File 83-0268 (EDPa) Class Actioin Argument, July 30, 1984, Tr 106.[30]

Mr. Newberg in an article published in Trial, February Issue 1986, at page 53, under the title *Mass Tort Class Actions*, expressed in somewhat extended form the same view:[31]

> Mass tort class actions are rapidly emerging as a way to handle claims resulting from negligent acts or

[30] 3 Newberg on Class Actions, § 17.06, p. 373 (2d ed.1980).

[31] Mr. Newberg is a counsel for the appellees in this proceeding, but it would seem his discussion, as quoted here, preceded his connection with this case.

defective or toxic products affecting groups of similar parties. The historical barriers to class actions in the negligence field are fast giving way. Why? The problems of trying to resolve personal injury claims of often tragic proportions on anything but an individual basis still exist, do they not? Yes, but . . .

Two benchmarks herald the arrival of mass tort class actions. First, the emerging judicial acceptance of class suits involving mass torts is undoubtedly the result of cumulative effects of mass production, with its attendant imperfections, in the context of a growing population and a court system with finite growth dimensions. The other arises from a single event—the Johns-Manville bankruptcy proceedings.

Society relies on the tort system, as enforced by private damage actions, to prevent or deter mass accidents and torts, and to compensate their victims. As mass production increases, there will inevitably be an increase in personal and economic injuries arising from mass accidents and from the mass distribution of defective or toxic products. Lawsuits seeking redress for these injuries will also inevitably multiply.

Many courts are now abandoning their historical reluctance to certify mass tort class actions in light of what is often an overwhelming need to create an orderly, efficient means for adjudicating hundreds or thousands of related claims. It is not surprising that the *Manual for Complex Litigation, Second,* has a section dealing with class actions in mass disasters and other complex tort cases. More and more tribunals now recognize that a central judicial tool for coordinating many related tort claims is the class action.

In the Tentative Draft No. 1 issued by The American Law Institute Complex Litigation Project and prepared for considera-

tion at the 1989 Annual ALI Meeting, the Committee on the Federal Intrasystem Consolidation, of which professor Arthur Miller was the Reporter, declared (Pages 36-37):

> Rule 23 provides for the adjudication of the claims or defenses of an entire class of similarly situated parties in a single action. The Federal Rule is intended to eliminate or reduce the threat of repetitive litigation, to prevent inconsistent resolution of similar cases, and to provide an effective means of redress for individuals whose claims are too small to make it economically viable to pursue them in independent actions. Despite Rule 23's ambitious goals, multiparty, multiforum cases often are not certified for class treatment because its requirements have been read quite restrictively by some federal courts. Large scale tort actions involving personal injuries rarely are certified. In the past, this may be due primarily to the federal courts' reliance on the statement in the 1966 Advisory Committee Note that
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> > [a] "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability and defenses to liability, would be present, affecting the individu als in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits sepa rately tried.
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> Fed.R.Civ.P. 23(b)(3), Advisory Committee Note (1966). Although this reasoning may be criticized as

> shortsighted, it nonetheless has been influential. In adaddition, concerns about how to handle individual issues and large numbers of claimants have served to restrict class certification in nationwide products liability cases, as well as in consumer, securities, and antitrust actions. Recent years, however, have seen some weakening in the resistance to the certification of mass tort class actions. *E.g., Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, *rehearing en banc denied*, 785 F.2d 1034 (5th Cir. 1986); *In re School Asbestos Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *vacated in part, aff'd in part*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 182 (1986). Nonetheless, the full procedural advantages of class actions have not been realized.

Among the cases which the courts were said to have "read the requirements of Rule 23 narrowly," the Draft identified *In re Northern District of California Dalkon Shield IUD Prods. Liability Litigation*, 693 F.2d 847, (9th Cir. 1982), *cert. denied* 459 U.S. 1171 (1983); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied* 459 U.S. 988 (1982). Page 40 of the Draft. Later, the Draft observes (page 43):

> Several commentators have decried the courts' narrow approach to the Rule, arguing it should be interpreted more broadly to achieve unitary adjudication.

It cites in support Professor Miller's article, *An Overview of Federal Class Actions: Past, Present and Future 45* (Fed. Jud. Center 1977); 96 Harv.L.Rev. 1143 (1983) and 47 Alb.L.Rev. 1180, 1199 (1983), already discussed.

It will be observed that the principal reason assigned by the Advisory Committee for its cautionary comment on mass torts

in the 1966 Notes was that individualized proof of damages in such a case was not practical in a class action format. The authors in 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1784, at 78-82 (2d ed. 1986), found this reasoning not persuasive, saying:

> Rule 23 provides more than enough flexibility and room for judicial innovation so that the question of damages can be determined through individual trials on that issue pursuant to "equitable procedures" devised by the court.
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> . . . .
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> One possibility is to try the damage issue only once, making a single award for the class, and then develop an expeditious administrative means of dividing the lump sum among the class members. This approach has been employed in judicially approved settlements under Rule 23(e) and the courts could look for guidance to some of the procedures that have been developed in that context.
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> Utilizing procedures to distribute a lump sum recovery is judicially economical since it eliminates the need for separate trials on damage issues. In a case involving an extremely large plaintiff class whose members only have small individual claims, the savings in time and expense for all will be considerable. Occasionally this will be achieved at the expense of some traditional procedural safeguards, most notably jury trial. Nonetheless, simplifying the process of establishing individual claims may be the only way of making it economically feasible for class members to come forward and assert their rights and some of the procedural patterns that are considered fundamental when when the litigation involves the single plaintiff and a single defendant will have to be abandoned. (Footnotes omitted).

Moreover, Professor Arthur Miller in a perceptive article published in 1979, *Of Frankenstein Monsters and Shining*

Knights: Myth, Reality, and the "Class Action Problem", 92 Harv.L.Rev. 664, warned against the tendency in some of the decisions to disregard the effect of the changing pattern of litigation on the application of the Rule and suggested an innovative application of the Rule dealing with this changing pattern of litigation as represented by the mass torts. He wrote:

> It is important in understanding the class action debate to realize that the "big case" phenomenon transcends the class action. The "big case" is an inevitable byproduct of the mass character of contemporary American society and the complexity of today's substantive regulations. It is a problem that would confront us whether or not rule 23 existed. Indeed, it is becoming increasingly obvious that the traditional notion of civil litigation as merely bilateral private dispute resolution is outmoded. Since our conception of the roles of judges and advocates is based on this traditional view, the ferocious attack on the class action may reflect anxiety over the growing challenge to the model's immutability.
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> . . . .
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> Even in its current elaborated form, rule 23 really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of circumstances and in a variety of innovative ways.
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> . . . .
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> The procedural complexities that can emerge under rule 23 are extraordinarily variegated in character. Class actions tend therefore to be processed in a highly individualistic fashion, making the extrapolation of general propositions from judicial opinions difficult and overall evaluation risky; procedural techniques employed in one case may be ill suited in another context. Every rule 23 decision, therefore, must be

92 Harv.L.Rev. at 668, 677 (footnote omitted).

> viewed through the prism of its particular facts, some of which may not even appear in the court's opinion. 92 Har.L.Rev. at 668, 677 (footnote omitted).

Another commentator has chided appellate courts[32] for failing to recognize the seriousness of the mass tort problem and for failing to abandon their narrow approach to the use of the class action device in the handling of mass tort litigation. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039 (1986). She said:

> Confronted with the realities of this growing, nationwide mass-tort litigation crisis, an increasing number of judges and commentators have urged a more flexible application of Rule 23 in the mass-tort context in order to better serve the interests of justice. Yet these judicial and scholarly pleas continue to fall on deaf appellate ears as the circuit courts persist in construing narrowly the Rule 23 class action procedure.[33] 64 Tex.L.Rev. at 1043 (footnotes omitted).

It is obvious that there is a movement towards a more liberal use of Rule 23 in the mass tort context. This new attitude has found expression in a number of recent cases which recognize that the mass tort phenomenon has created a pressing "[n]ecessity . . . to change and invent," *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 473 (5th Cir. 1986), with the result that, as one court has correctly concluded, "the trend has been for courts to be more receptive to use of the class action in mass tort litigation." *In re*

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[32] The reason for singling out appellate courts for criticism in this regard is that District Courts which are more intimately involved in mass tort litigation and the problems caused by such suits for court management and administration have shown a much greater willingness to utilize the class action device in this context than courts of appeals.

[33] Later, Professor Mullenix offers an olive branch to the courts by absolving them of any "fault" and in assigning the fault to Rule 23 itself. Thus she wrote:

> Clearly, the fault lies not in the courts or commentators, but in the requirements of Rule 23. Assuming, as many jurists and commentators agree, that the class action mechanism is superior to

(con't.)

School Asbestos Litigation, 789 F.2d 996, 1009 (3d Cir.), *cert. denied*, 479 U.S. 852, 479 U.S. 915 (1986). This approach, with its skepticism on the current validity of the reasons suggested in the earlier 1966 Advisory Committee Notes on which the Ninth Circuit had rested its limited restrictions as stated in *La Mar* and *McDonnell Douglas*, was explained in *Jenkins:*

> Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class (citing Advisory Notes). The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters (citing authority). If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past. Be that as time will tell, the decision at hand is driven in one direction by all the circumstances. Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, "days of the same wit-

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any other currently available method for adjudicating mass-tort claims, then either Rule 23 should be retailored to the mass-tort case, or Congress should enact a federal procedure act designed to accommodate the special problems of contemporary mass-tort litigation. 64 Tex.L.Rev. at 1043-44 (footnotes omitted).

This comment is somewhat contradictory of the author's earlier statement in which she concluded the fault lay in the persistence of the circuit courts "in construing narrowly the Rule 23 class action procedure."

nesses, exhibits and issues from trial to trial." 782 F.2d at 473.

The decision in *Jenkins* involved a mass asbestos case. In all asbestos cases, a primary defense had evolved about the "state of the art" defense at the time of the happening of the alleged tort. Evidence on that issue, the District Court found, "would vary little as to individual plaintiffs while consuming a major part of the time required for their trials."[34] 782 F.2d at 471. The District Court concluded that "[c]onsiderable savings, both for the litigants and for the court, could thus be gained by resolving [this "state of the art" defense] *and other defense- related questions, including product identification, product defectiveness, gross negligence and punitive damages, in one class trial" Ibid.* (Italics added). It accordingly "certified the class as to the common questions, ordering them resolved for the class by a class action jury. The class jury would also decide all the individual issues in the class representatives' underlying suits; individual issues of the unnamed members would be resolved later in 'mini-trials' of seven to ten plaintiffs." *Ibid.* The District Court said further that "[a]lthough the class action jury would evaluate the culpability of defendants' conduct for a possible punitive damage award, any such damages would be awarded only after class members had won or settled their individual cases." Such were the circumstances under which the class certification was granted by the District Court in that case. The defendants on appeal challenged the certification under (b)(3). The Court of Appeals, after observing that "[t]he purpose of class actions is to conserve the resources of both the courts and the parties by permitting an issue potentially affecting every [class

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[34] This summary of the District Court's conclusion is taken from the Court of Appeals' opinion on appeal of the District Court's opinion.

member] to be litigated in an economical fashion" *Ibid.* at 471, (quoting from *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 155 (1982), and recognizing the innovativeness of the District Court's procedure, affirmed that Court's action, saying that "in light of the magnitude of the problem and the need for innovative approaches, we find no abuse of discretion in this court's decision to try these cases by means of a Rule 23(b)(3) class suit." 782 F.2d at 475.

The *School Asbestos* case was a consolidated suit instituted by various school districts in several states to recover the costs of testing and removing asbestos material from their buildings. It is another decision in which the court engaged in "rethinking" the use of class actions in mass tort suits. In that case, the District Court certified a nationwide mandatory class for punitive damages and an opt-out class (*i.e.*,(b)(3)) for compensatory damages. On appeal, the certification of a mandatory class for punitive damages on the record then before the Court was vacated with the statement that "we hold open the possibility of a 23(b)(1)(B) punitive damage class in more appropriate circumstances," 789 F.2d at 1008, but the certification for compensatory damages under (b)(3) was affirmed. In approving the (b)(3) certification, the Court recognized, as we have observed, that "the trend has been for courts to be more receptive to use of the class action in mass tort litigation." 789 F.2d at 1009. After taking note of the Advisory Committee Note on the mass tort case, the Court then dismissed the modern applicability of such comment thus:

> Although that statement continues to be repeated in case law, (*i.e.*, Advisory Note to (b)(3) of Rule 23) there is growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment. An airplane crash, for instance, would present the same liability questions for each passenger, although the damages would depend on individual circumstances. Determination of the

> liability issues in one suit may represent a substantial savings in time and resources. Even if the action thereafter "degenerates" into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again. *See Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D.Fla. 1973).
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> Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation. *See* Fed.R.Civ.P.23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration. 789 F.2d at 1008-09.

After expressing agreement with the reasoning in *Jenkins*, the court in *School Asbestos* further commented:

> Manageability is a practical problem, one with which a District Court generally has a greater degree of expertise and familiarity than does an appellate court (omitting citation). Hence, a District Court must necessarily enjoy wide discretion, and we are not inclined to reverse a certification before the District Judge has had an opportunity to put the matter to a test. 789 F.2d at 1011.

Finally, in upholding the (b)(3) certification, the Court concluded its opinion with this statement:

> We acknowledge that our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The District Court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might

offer some possibility of improvement over the methods employed to date. *Ibid.*

A highly publicized example of this new thinking is also provided by *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983). That was an action by a class of former military servicemen or their families seeking recovery of both compensatory and punitive damages for injuries suffered by them while serving in Vietnam as a result of the use by the military forces of a certain herbicide. A primary defense asserted by the manufacturers of the herbicide was the government contract defense. After notice and hearing, the District Court certified all issues, other than punitive damages for trial and disposition, under (b)(3); it certified the punitive damage issue under (b)(1)(B). After certification, the parties submitted a proposed settlement of the action. In granting such certification, the court noted the common issues involved in the government contract defense asserted by the defendants and in the claim of causation, the immense size of the plaintiff class, and the likelihood that certification might "encourage settlement of the litigation." 100 F.R.D. at 720-21, It found that in the previous cases where certification had been denied in this type of case, the courts had relied for their action on the Comment of the Advisory Committee already quoted, and it seems to have dismissed the Comment as applicable to the "mass accident" type of mass torts but not to "a mass products liability based upon a series of discrete events." 100 F.R.D. at 722. In response to the defendants' request that certification be confined to the issue of the government contract defense, the court found such proposal was "not a workable one," that it was impossible to try that issue without litigating the issue of causation, and that the common question in the case predominated over any issues affecting individual members. 100 F.R.D. at 723. In resolving the certification issue, it emphasized the importance of certification as related to settlement of the action:

> ..... the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.[35]

It accordingly certified the case on all issues other than punitive damages under (b)(3)[36] and on punitive damages under (b)(1)(B).

On appeal, the Court of Appeals affirmed. *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). On the (b)(3) certification, the court found that

> it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely. Moreover, since these issues may involve extensive documentary and testimonial evidence, Chief Judge Weinstein found that obviating a retrial in countless individual cases will lead to substantial economies in the use of judicial and private resources. 725 F.2d at 860-61.

It explicated this inclusion with the comment that "there [were] substantial grounds at this stage to support [the District Court's] conclusion that the common issues predominate and that a class action is the most efficient means of adjudicating them." *Ibid.*, at 861. It found in particular that "[t]he unique common issues take the case out of the general rule that '[a] "mass accident" resulting

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[35] *Ibid.* There was a settlement had in the case after certification.

[36] It disapproved a (b)(2) certification.

in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.'" *Ibid.*, quoting the Advisory Committee Note. Later, on appeal from final judgment, the grant of certification under (b)(3) was reaffirmed, though with some expressions of skepticism of the difficulties of managing expeditiously mass tort suits, finding that "class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense. First, this defense is common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2)." *In re "Agent Orange" Products Liability Litigation,* 818 F.2d 145, 166-67 (2d Cir. 1987), *cert. denied,* 108 S.Ct. 695 (1988). Because of this ruling, it found no need to consider at the time the question of the punitive damage claim.

One of the most instructive cases in this connection was cited by the appellants in support of their objection to class certification, *Federal Skywalk Cases.* The action in that case concerned claims arising out of the Skywalk disaster in the Hyatt Regency Hotel in Kansas City, Missouri on July 17, 1981. There the District Court had certified a Rule 23(b)(1) mandatory class action on the issues of liability for compensatory damages, liability for punitive damages and amount of punitive damages.On appeal, the Court of Appeals found that the mandatory class action was barred by the Anti-Injunction Statute, 28 U.S.C. § 2283, but in so ruling, it recognized the complex issues faced by the District Court, commended the District Court's "creative efforts," but concluded that the certification could not "stand on the facts before it." *Federal Skywalk Cases,* 680 F.2d 1175 (8th Cir. 1982), *cert. denied,* 459 U.S. 988 (1982). However, by limiting its opinion to the facts before it, the Court of Appeals left open the possibility that some future mandatory certification in the action might be better received. The subsequent developments in

the *Skywalk* case appears in 97 F.R.D. 380 (W.D. Mo. 1983) with a comment on those late developments in an article co-authored by Judge Wright, who had written the earlier District Court opinion, and Joseph Colussi, titled *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L.Rev. 141, 141-143 (1984), in which they made this interesting comment on the denouement of the *Skywalk* litigation:

> Several commentators have recently suggested that the appellate court decision in the *Skywalk* mass tort case vacating certification of a mandatory class action struck the death knell for the use of the class action procedure in the management of mass tort litigation. The manner in which the *Skywalks* litigation was managed and resolved in the wake of that appellate court decision, however, demonstrated that the opposite is true. What many observers of the *Skywalks* litigation have failed to recognize is that the litigation was ultimately managed and resolved through the use of the class action procedure. After the mandatory class action was vacated by the appellate court, two nearly identical voluntary class actions were certified and settled in the federal and state trial courts. The certification and settlement of those two voluntary class actions performed the same management function and permitted the claims of all litigants to be resolved in the same equitable and efficient manner that would have resulted if the mandatory class action had not been vacated.
>
> The experience of the *Skywalks* litigation has made clear that the mandatory class action device is the only procedure presently available to state and federal courts which allows for the equitable and efficient management of mass tort litigation. Though the appel-

> late court ruling in the *Skywalks* litigation did not prevent the eventual equitable and efficient management of that mass tort case through the use of the class action device, the ruling unwittingly sanctioned forum shopping and inequitably parceled the burden of mass tort litigation management between state and federal trial courts. The appellate court effectively placed the full responsibility of mass tort management on its state court brethren.

It may be definitely said--respecting the language of *School Asbestos, supra*--that the "trend" of the authorities is clearly in the direction of a more liberal approach to the certification of the mass tort action.

XVI.

It is to be noted that a number of the decisions we have discussed involved settlements of the proposed class action. This raises the question whether class certification for settlement purposes is permissible under Rule 23. The appellants argue flatly that certification for such purposes is impermissible. However, despite this statement of appellants, certification for such purposes finds strong support in a number of various Law Review comments. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 Harv.J. on Legislation 461, 480 (1988), for instance, recognized a "trend" in favor of such certification:

> In recent years, several federal judges have explicitly recognized the effect of class certification on the likelihood of prejudgment settlement in mass-tort suits, and have apparently allowed such recognition to influence their decision to certify class actions.

Professor Transgrud, though he took a somewhat skeptical view of mass-tort certifications generally, felt that certification "as a pretrial joinder device to facilitate group settlements [was]

both proper and desirable," adding

> Its use is proper because Federal Rule of Civil Procedure 23 provides that the court may certify a common question class action when it will prove "superior to other available methods for the fair and efficient adjudication of the controversy." A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words, "adjudicating," the value of claims arising from a mass tort. As a result, if conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for a group settlement, then Rule 23 authorizes certification.

Transgrud, *Joinder Alternatives in Mass Tort Litigation,* 70 Cornell L.Rev, 779, 835 (1985).

Recent court decisions have also spoken approvingly of the class certification of mass-tort actions for purposes of settlement in conformity with these academic comments. These decisions confirm that the promotion of settlement may well be a factor in resolving the issue of certification. Thus, in *Agent Orange*, Chief Judge Weinstein wrote, (100 F.R.D. at 723):

> Finally, the court may not ignore the real world of dispute resolution. As already noted, a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties and with the federal government.

Similarly, in *In Re School Asbestos Litigation*, 789 F.2d at 1009, the Court said:

> Concentration of individual damage suits in one forum can lead to formidable problems, but the reali-

> ties of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.

The only federal court decision which has actually granted class certification for settlement purposes in a mass tort action is *In re Bendectin*, 102 F.R.D. 239, 240 (S.D. Ohio 1984). In that case, Judge Rubin, in granting certification for settlement purposes, said:

> The Bendectin litigation is but one example of massive product liability lawsuits involving large numbers of plaintiffs, protracted trials and substantial litigation costs. The traditional court system is simply unequipped to handle such [mass tort] litigation in a conventional manner without materially depleting the judicial resources available for all other litigation. It is theoretically possible to assign sufficient judicial time to hear these cases promptly but only at the cost of further delay in an already overburdened system. The cost to the parties of litigating these cases under current procedures is such that few plaintiffs could afford the expense or the delay. Justice is not served by erecting tollgates at the courthouse door.
>
> There is a solution. The resolution of disputes does not necessarily require trial. Within the judicial authority of this Court is a means whereby the parties might be assisted in reaching a prompt and equitable disposition of the entire problem. That solution involves limited use of Rule 23 of the Federal Rules of Civil Procedure. A class certification would enable any proposed settlement to be presented to all class members and by them either accepted or rejected.

On appeal, the certification was invalidated, 749 F.2d 300 (6th Cir. 1984). The ground for denial was that the action failed to qualify for certification under (b)(1) because of the limitation in the use of the class action decision stated in *McDonnell Douglas*, and under the "limited fund" doctrine. The Court, however, was careful to point out that it was not determining that class certification for settlement purposes of the mass tort in that case was impermissible. To emphasize this fact, the Court declared at p. 305, n 10:

> We do note that there is precedent for the proposition that a class can be certified for settlement purposes only. *See, e.g., In re Beef Industry Antitrust Litigation,* 607 F.2d 167 (5th Cir. 1979), *cert. denied,* 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). *The Beef Industry* case involved the certification of a temporary settlement class prior to certification of a class for trial. In this case, the District Judge certified a class for settlement purposes after having rejected the same class for trial purposes. The District Judge therefore implicitly held that the standards for certifying a class are different depending on whether the class is for settlement or whether it is for trial. Because we decide the case on other grounds, we do not consider whether this holding is correct.[37]

As *Bendectin* had recognized, courts in cases involving numerous parties, though not mass-tort cases, had granted class certification for settlement purposes. Judge Wisdom in *In re: Beef Industry Antitrust Litigation,* 607 F.2d 167 (5th Cir. 1979), *cert. denied,* 452 U.S, 905 (1981), carefully considered all angles of the question of class certification to promote

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[37]*See* the recent San Juan mass accident case, which has as its basis a settlement, as set forth later in note 41 at pages 83-85.

settlement and, in his convincing opinion, found certification under proper circumstances to be in order. That decision has been followed in other cases, perhaps the most notable one being *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982), in which Judge Friendly, speaking for the court, said:

> The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most Courts have recognized their utility and have authorized the parties to seek to compromise their differences, including class action issues through this means.

See also In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379, 1388-90 (D.Md. 1983); *In re First Commodity Corp. of Boston, etc.*, 119 F.R.D. 301, 306-08 (D. Mass. 1987).

Though, as we have said, these cases were not mass-tort suits, there seems to be no real reason why the precedent established by the cases, just cited, should not be equally applicable to the mass-tort. If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification. That is all the District Court did in this case. Its action in considering this circumstance would appear to have been appropriate.

XVII.

In summary, we take it as the lessons to be gleaned from the authorities already cited and discussed to be (a) that the "trend" is once again to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case "best serve the ends of justice for

the affected parties and . . . promote judicial efficiency"; (b) that the Advisory Committee's Note suggestion that suit for damages is "not appropriate" for class certification has proved unworkable and is now increasingly disregarded; (c) that the theory that the Rule should be constrained by establishing judicially, without support in the Rule itself, limitations on its use such as were stated in *La Mar, Green, and McDonnell Douglas* has been outdated by the increasing phenomenon of the mass products tort action and by the growing body of recent class action decisions and comments favoring class actions in the mass tort context; (d) that, in order to promote the use of the class device and to reduce the range of disputed issues, courts should take full advantage of the provision in subsection(c)(4) permitting class treatment of separate issues in the case and, if such separate issues predominate sufficiently (*i.e.*, is the central issue), to certify the entire controversy; and (e) that it is "proper" in determining certification to consider whether such certification will foster settlement of the case with advantage to the parties and with great saving in judicial time and services; and (f) that the mass tort action for damages may in a proper case be appropriate for class action, either partially on [sic] in whole.

We accordingly now turn to an attempt to apply these lessons to the facts of this case.

XVIII.

The overriding fact to be observed in attempting to apply these rules for class certification here is the uniqueness of this case. It is not simply a case by a numerous group or class suing one or more tortfeasors in one action to recover for a single set of wrongful acts. This is a case in which literally hundreds of thousands of claimants are involved as proposed class parties. It is a suit that breaks down into a number of separate and distinct issues, each of which is susceptible of independent proof, analysis and resolution and several of which arise out of the same factual background, pose a like legal issue and provide a basis for

a separate certification. The first of these separate issues is one for the rescission or, as it is described in the complaint herein, a "vitiation" of a 1984 agreement between Robins and Aetna on the coverage afforded Robins under Aetna's policy. The differences between Robins and Aetna which this settlement disposed of, grew out of certain extra sums allegedly due "on account of defense costs and related items" over and above the stated face amount of the contract of insurance by Aetna to Robins. The agreement which settled the difference provided that Aetna would increase coverage to the extent of several millions of dollars beyond the face limits of the policy. The *Breland* plaintiffs challenge the correctness of this settlement made by Robins with Aetna. They assert that they, as the representatives of the class of Dalkon Shield claimants, were third-party beneficiaries of the policy between Aetna and Robins and that they should have been involved in the settlement but were not and that their interest and the interest of all members of the class they seek to represent were prejudiced by such settlement. They wish to reopen the settlement and to seek apparently some additional sum in settlement from Aetna, thereby creating a fund in which all Dalkon Shield claimants would have a common interest. This is a classic type of "limited fund" embraced within the authorization of subsection (b)(1)(B) of Rule 23 and as such is properly certified for class treatment as a separate class under subsection (c)(4) of the Rule. The District Court properly certified the issue under (b)(1)(B) and (c)(4), and we do not understand the appellants to contest this ruling.[38]

The second issue represents the point which is critical and in dispute in this appeal. That issue poses the question whether Aetna may be subjected to liability in the Dalkon Shield litigation as a joint tortfeasor. The theory on which the *Breland*

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[38] On page 4 of their brief in this court, the appellants, after referring to this "limited fund" claim in the complaint, stated: "We are not concerned here with that matter."

plaintiffs premise this right against Aetna has as its basis the claim that Aetna went beyond its duty as the insurance carrier for Robins and became an "active participant in all stages of the development, testing, promoting, and marketing of the product [Dalkon Shield]. . . ." It alleged that Aetna's conduct in this regard made it a joint tortfeasor equally liable with Robins in all the Dalkon Shield suits. This contention goes to the very heart of the plaintiffs' case here and overhangs the other issues in the litigation. It occupies the same place in this litigation as the military contractor defense as *Agent Orange* and as the "state of the art" did in *Jenkins*. If the Dalkon Shield plaintiffs were to be unable to establish that basic issue in their favor, there would be no Dalkon Shield liability for Aetna and no trial herein would be required on the defectiveness of the Dalkon Shield. Further, there would be no dispute for resolution herein over causation or damages in these cases. It was accordingly very much in the interests of both Aetna and Dalkon Shield claimants as well as in the public interest that this issue common to every Dalkon Shield case be resolved through a class certification rather than through an interminable procession of thousands of individual cases. If that issue could be disposed of in a class certified context, the courts might well be saved the trial of thousands of Dalkon Shield claims.

Whether Aetna is liable as a joint tortfeasor in Dalkon Shield litigation will depend on an analysis of a common nucleus of facts that will not vary in the individual cases. The bulk of these facts, it seems apparent from those in the record, will be documentary. Most of those facts on which the determination of joint tortfeasor on Aetna's part is to be made are detailed already in the record on appeal. Assuming no certification, that legal determination will be made in each individual case by the court before whom the individual case may be tried. Absent class certification, the risk of conflicting decisions on that issue could be anticipated in practically every individual case against Aetna

that would be tried. That threat of conflicting legal standards and results could well create a chaotic situation in this case. There are over 300,000 claims and possibly the same number of suits (assuming there is no certification). It would be intolerable that whether liability could exist might vary from state to state on the legal standard that each particular court, hearing a Dalkon Shield case against Aetna, would apply to this common nucleus of relevant facts. It would thus be possible that one plaintiff, suing in State A, would be permitted to recover against Aetna as a joint tortfeasor but in sister State B, another plaintiff, equally entitled to relief, would not be permitted to recover. This is the very situation to which the lead attorney for the plaintiffs on this appeal, along with his co-author, referred in his article, already cited, when he said that in the mass tort context the public cry was:

> Why should hundreds, or even thousands, of trials take place in which the same issue of a defendant's liability is litigated over and over again? Why should some plaintiffs recover compensatory and punitive damages, while other plaintiffs in other trials receive much less, or nothing at all, even though the issues of liability and causation are the same?[39]

The writer in 96 Harvard Law Review at 1154, 1155 commented in the same vein:

> Two goals of tort law should be predictability and uniformity. . . But if various factfinders reach inconsistent conclusions about the same set of facts, the defendant (and others in similar circumstances) is left without any guidance concerning the legality of its conduct, which may serve important legitimate aims. . . . But defendants and plaintiffs alike have compelling

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[39] *See Panzer & Patton, supra*, 21 Tort & Ins. Journal at 561.

> interests in consistent liability determinations, interests that can and should be addressed. Therefore, certifying (b)(1)(A) classes to promote these interests, even in cases in which there is no danger of conflicting equitable decrees, is fully compatible with the language and policy of the rule [Rule 23].

There is another important circumstance. Under Aetna's stipulation, a certification and resolution of the issue of Aetna's liability as a tortfeasor would, if the decision were adverse to Aetna, result in a resolution of all individual issues of causality and damages through a Claims Resolution Facility, obviating an endless procession of separate individual suits with varying results (some possibly in the few cases where the claimant elected for a jury trial rather than arbitration under the procedure to be followed under the Claims Resolution procedure) in suits heard in courts all over the country.

When an issue central to all the claims can be resolved by a class certification for all claims in the Dalkon Shield context without requiring a trial of the underlying Dalkon Shield liability claims and can be done with fairness to all Dalkon Shield claimants against Aetna, as it could be under the plan for the resolution of the non-common issues, it would be unfair alike to the litigants and to the societal interest in maintaining an efficient court system to refuse class certification. The likelihood of conflicting decisions and varying decisions of liability based on the standards of law applied to identical facts by different courts provide the very conditions contemplated in Rule 23 (b)(1)(A) for class certification herein.

There is still another circumstance that pleads for certification of the issue of Aetna's liability as a joint tortfeasor. If Aetna is forced to go to trial on every individual Dalkon Shield case on the issue whether it is a joint tortfeasor and assuming that some of the individuals prevail both on that issue and that on the issue of recovery in a few of such cases, Aetna would, under the rule

prevailing in a majority of the States be entitled to contribution by Robins. Such claim for contribution could be a contingent, unliquidated claim entitled to treatment in the Robins bankruptcy. To dispose of that claim, the court having jurisdiction over the bankruptcy would be required either to delay the bankruptcy proceedings until the right to and the amount of the claim of contribution could be exactly ascertained through an "estimation" as mandated under Section 502(c) of the Bankruptcy Code.

Further, it is possible that even if this issue of Aetna's liability as a tortfeasor were resolved in favor of Aetna's liability, the burden of Dalkon Shield cases on the courts would still have been rendered more manageable by the courts because of a certification. Aetna has stipulated in the record herein that, if this case is certified as a mandatory class action under (b)(1)(A), and "if the liability issue were resolved against Aetna in *Breland* unfavorable to Aetna," [i]t would "agree not to litigate separately any of the non-common issues of individual medical causation and individual counts of damages. Instead these issues, if reached, would be resolved for class members through the Claims Resolution Facility", which would be coordinated with the Claims Resolution procedure to be provided in the Robins reorganization proceedings. It is interesting that this procedure for disposing of the case is not novel; it follows largely the suggestion made in 7B C. Wright, A. Miller & M. Kane at 80 and 81, already discussed herein, and, as formulated by the courts in *Jenkins* and *Skywalk II*. The process begins under the Wright-Miller-Kane model with a trial "only once" of the damage issue, making a single award for the class, and with the development of an expeditious administrative means of dividing the lump sum

among the class members."[40] Similarly, in the Robins reorganization, the procedure begins as we have seen, with a judicially determined "estimation," made on the basis of a full hearing and after arguments of counsel, of a sum which would fully compensate every qualifying Dalkon Shield claimant for her injury. To accomplish that result, the Plan of Reorganization creates a Trust which in turn was to establish a claims resolution facility. Each Dalkon Shield claimant would file her claim with the Trust or facility, which, in turn, would following some discussions, make an offer of settlement. If the claimant accepted the settlement offer, that would constitute full and complete settlement of her claim against Robins, Aetna, American Home and all others.

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[40] It seems that in a number of mass accident cases, the courts have recently followed much the procedure suggested in the district court opinions in *Bendectin* and followed *Skywalk II* and as recommended earlier by C. Wright, A. Miller & M. Kane, *supra*.

Thus, an AP report published in *New York Times* on May 12, 1989, p. 8, reported the acceptance in the San Juan hotel fire case by the federal judge in charge of the negotiations of a settlement therein involving 2,300 plaintiffs seeking damages in 264 separate suits against 230 defendants with an *ad damnum* clause totaling $1.8 billion in damages. The federal judge sustaining the settlement, Judge Bechtle of the Eastern District of Pennsylvania, had been appointed to handle the cases by Chief Justice Rehnquist, according to the Ap article. The article stated that the judge had "accepted a plan to pay up to $100 million to settle hundreds of law suits stemming from the fire at the Dupont Plaza Hotel on New Year's Eve, 1986, that killed 97 people." The court explained that the agreement of settlement "was binding on all parties if certain conditions that were not specified were met" but one of plaintiffs' counsel said that the conditions "generally dealt with deadlines for the defendants to pay their share of the settlement." It will be observed that the plan of settlement arrived at an overall award, which was then to be awarded among the plaintiffs. Similarly, it would seem the amount of the award was determined by the weight— or, more appropriately lack of weight—of the plaintiffs' case against the named defendants. Three members of the International Brotherhood of Teamsters had been "convicted of murder in 1987 for setting the fire," which had caused the accident. The liability of the defendants who had no connection with the claim or the three parties was, as is Aetna's

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Should she not wish to accept, she has the option of deciding her claim by arbitration or by a jury trial at her option. If the claimant opts for a jury trial, the suit shall be against the Trust, the "[v]enue shall be unchanged by the chapter 11 case" and "[a]ll claims and defenses shall be available to both sides at a trial." That was the combined procedure to be followed for resolving all Dalkon Shield claims against both Robins and Aetna, as well as any other parties involved. This procedure accords with what the Supreme Court in *General Telephone Co. v. Falcon,* 457 U.S. at 155, declared to be the purpose of class actions, especially in the mass tort context, to ensure "the resources of both the courts and the parties by permitting an issue potentially affecting every

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settlement by those parties. Further, all the claimants were subjected to the class settlement, making the settlement in the nature of a mandatory class certification.

The same article states that Judge Bechtle "had presided in a similar case involving the 1980 fire at the MGM Grand Hotel in Las Vegas that killed 54 people. The settlement in that case was $200 million.

It is manifest from this that the courts have already begun to follow the procedure suggested in 78 C, Wright, A. Miller & M. Kane at § 1784, discussed previously herein, in the mass accident case. There is no logical reason for not using it also in the mass tort product case.

An earlier news article indicated that this procedure has also awakened consideration at the legislative level. Thus in the New York Times for August 7, 1984, Section D, page 2, column 1, it is said:

> There has been a lot of talk in Congress and even a little action - about unclogging the courts by setting up some sort of out-of-court claims-handling facility to resolve product liability problems involving substances that have injured hundreds, or thousands, of people.
>
> Much of the Congressional concern was prompted by the more than 20,000 asbestos-related lawsuits now swamping the courts. In both the House and the Senate, legislation has been introducedto take those cases out of the courts and instead handle them through a fund offering fixed payments for different levels of injury. Thoseproposals are stalled, but there is some movement on separate legislation that would create an out-of-court mechanism to compensate people injured by toxic substances.

[class member] to be litigated in an economical fashion." [citation omitted] As the Court in *Jenkins* said, "in the light of the magnitude of the problem and the need for innovative approaches," 782 F.2d at 475, we find no abuse of discretion on the part of the District Judge in his certification herein under these circumstances.

There is a final reason why certification is warranted in this case. As a result of the conditional certification made by the District Judge, the parties in the *Breland* action were enabled to develop a settlement of this controversy—a settlement which has been approved by approximately 95% of all voting claimants. As Professor Transgrud, in the article already cited and quoted has correctly stated, class certification "is proper because Federal Rules of Civil Procedure 23 provides that the court may certify a common question class action when it will prove 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *See also* Schuster, *Precertification of Class Actions: Will California Follow the Federal Lead*, 40 Hastings L.J. 863, 873 (1989).

The appellants, however, would find the certification invalid because it fails to provide an opt-out right in favor of claimants under the procedure established. They assert that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 792 (1985), proscribes any class certification, which does not provide the class members with the right to opt out. *Shutts*, however, has been the subject of considerable discussion by commentators. Many of the commentators take the view that *Shutts* held "that a state court can bind absent class plaintiffs to a judgment for money damages if it provides the absent parties the minimal procedural protections of adequate representation, notice of the action, and an opportunity to opt out of the litigation." Note, *Phillips Petroleum Company v. Shutts: Procedural Due Process and Absent Class Members: Minimum Contacts Is Out - Is Individual Notice In?*, 13 Hastings Const. L.Q., 817, 821 (1986); Note, *Phillips Petroleum Com-*

pany, v. Shutts: Multistate Plaintiff Class Actions: A Definite Forum, But Is It Proper?, 19 John Marshall L.Rev. 483, 485 (1986). The most careful and thoughtful comment on the decision is in Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986). The authors are not entirely certain of the effect of the decision on the mandatory class action with its no opt-out provision. The authors said that "[t]here is no neat and logical means of resolving the question whether mandatory actions survive *Shutts*. The answer depends upon the view one takes of *Shutts* itself and of the need for mandatory classes. It also depends upon the characteristics of the particular class action." *Ibid.* at 52 (footnote omitted). Professor Mark Weber, in an article titled *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 Univ. of Mich. J. of Law Reform 347 (1988), indicates a situation in which a mandatory class action which did not include an opt-out provision might qualify under *Shutts*. He wrote:

> The problem of the Rule 23(b)(2) class action is that binding absent class members without giving them notice and the right to opt out violates due process. The problem is clear under the apparently applicable standards of *Phillips Petroleum Co. v. Shutts*. Indeed, the only way in which the binding Rule 23(b)(2) class action might be seen not to be a violation of due process is if one follows *Mathews v. Eldridge* and weighs the harm to the interests of absentees with the cost of the alternative safeguard of notice and the right to opt out. 21 Mich. J.of Law Reform at 394 (footnote omitted).

Fortunately, however, *Shutts* —if taken as requiring an opt-out provision in any class certification, and assuming without deciding, that opt-out could not be validated here under the *Mathews*

v. Eldridge standard—is satisfied in this case. The requirement of an opt-out provision if proven, is based on principles of due process. Chief Justice Rehnquist made this quite clear in his opinion in *Shutts*. In this case the Trust created by the parties for the resolution of all Class A claims on individual causation and damages does not in express terms include an opt-out provision but in effect it does. The Plan gives every such class member the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.

Due process, the courts have often declared, "is a flexible concept," intended to ensure "fundamental fairness." *Walters v. Nat. Ass'n. of Radiation Survivors*, 473 U.S. 305, 320 (1985). See also *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). It is not a matter of semantics, not a matter of whether the talismanic word "opt-out" is used but whether the right given exists in effect. *Walters*, 473 U.S. at 321. Certainly, the procedure provided every class member here fairly meets the standard of "fundamental fairness" which due process demands. It follows that *Shutts*, if applicable, is fully complied with in this case.[41]

The appellants also posit that every class certification by a District Court has been reversed by the Court of Appeals and argue that such uniformity among the authorities should induce us to deny certification in this case. They list four decisions in support of this contention. *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984); *In re Northern District of California, Dalkon Shield I.U.D. Products Liability Litiga-*

[41] It may be suggested that there must be some negotiation between the Trust or its designated Resolution Facility and the claimant before an offer is made by the Trust in settlement of the claim. It is after this that the right accrues to a resolution of the claim by either arbitration or a jury trial at the option of the claimant. Such minimal delay in the right to settle a claim by arbitration or trial does not implicate due process rights. The negotiations have no binding effect

(con't.)

tion, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *reversing* 93 F.R.D. 415 (W.D. Mo. 1982), *cert. denied* 459 U.S. 988 (1982); and *In re Temple*, 851 F.2d 1269 (11th Cir. 1988).[42] We do not find that these cases support appellants' broad statement. For instance, *Temple* expressly disclaimed any intention to hold that "a products liability or mass accident suit could *never* be the proper subject of a class action." 851 F.2d at 1273 n. 7 (emphasis in original). It then cited *Dalkon Shield*, 693 F.2d at 853 (noting "that mass torts caused by a single transaction, i.e,, a plane crash, might be proper subject of a class action"), and *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 475 (5th Cir. 1986) (noting that the single issue of "state of art" defense certifiable in non-mandatory context), 851 F.2d at 1273 n. 7, as mass tort cases in which certification had been had. Actually, class action certification was denied in *Temple* because of lack of commonality on the part of the proposed class members; a contention not

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and may not be considered in a jury trial if the claimant elects to utilize such method of settling her claim. The delay in this case is much less than that required under the medical malpractice legislation, which has recently been enacted in many states under which medical malpractice claims must be submitted to a medical panel before suit. These have been found constitutionally valid in *Davison v. Sinai Hospital of Baltimore, Inc.*, 617 F.2d 361 (4th Cir. 1980); *see also Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir, 1979).

[42] On remand, the district court refused to grant Raymark's motion to certify a mandatory plaintiff class pursuant to Rule 23(b)(1)(B). *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 236 (N.D. Ga. 1989). The district court added: "Although this court would like to see a mechanism by which asbestos victims would be fairly and promptly compensated, this court, regretfully, concludes that the law does not allow a class action pursuant to Rule 23(b)(1)(B) to be that mechanism." *Ibid.* at 239.

We would note that in *Waldron*, the court refused to approve certification of a mandatory plaintiff class for purposes of the Rule 23(b)(1)(B) "limited fund" class action. Thus, *Waldron* is entirely different from, and has no application to, the certification of the present class under Rule 23(b)(1)(A).

made in this case. 851 F.2d at 1273. In *Bendectin*, the first case cited by appellants, the Court of Appeals expressly refused to decide whether class certification for settlement purposes was permissible under Rule 23 and decided the case on the ground that the action did not qualify under (b)(1) because of the limitation placed on the use of Rule 23(b)(1)(A) in *McDonnell Douglas*, already discussed, and because it did not produce sufficient proof of a limited fund. 749 F.2d at 305-06. For reasons already given, we believe *McDonnell Douglas* is outdated as a proper limitation on the use of (b)(1)(A). We have already discussed *Dalkon Shield* and pointed out the differences between that case and the case here point to the construction given *Dalkon Shield* in *Temple* and *Agent Orange*. Properly construed, *Dalkon Shield* went off on lack of a proper class representative, according to *Agent Orange*, *supra*. *Skywalk's* final end as set forth in 97 F.R.D. 380 (W.D. Mo. 1983) is not noted by the appellants. The most significant error of the appellants, however, is that, in making the broad statement that no Court of Appeals had sustained a mass tort certification, they completely disregarded *School Asbestos*, *Jenkins*, and *Agent Orange*, as well as the later decision in *Skywalk* all of which sustained a mass tort certification.

The appellants also assert that the *Breland* plaintiffs are not proper and adequate class representatives. This contention is based on the claim that there are claimants who object to class certification and the settlement which the *Breland* plaintiffs as class representatives submitted to the District Court for approval. Appellants' argument would deny class certification if any number of members of the class, however small, objected. Class certification cannot be defeated simply because a few claimants—actually, their attorneys—feel that they would fare better by pressing as quickly as they could their individual suits than they would if the suit were to be prosecuted for the benefit of all claimants. Certainly, in the mass tort situation, there is a

substantial societal interest. The burden placed on the judicial system resulting from every products liability litigation entails great public and private expense, encumbers the court calendars, and prejudices other litigants by unusual delays in their litigation. As we have already said, judges are required to try case after case where the same documentary evidence is produced, where the same expert witnesses and their tests are exhaustively developed, where there is extended direct and cross-examination, and required, as by rote, to repeat the same instructions to a jury. To permit a small number of claimants who are seeking actually to promote their own interests largely at the expense of the other claimants to frustrate a class certification in such a case is unthinkable.[43]

And what has been said here is equally applicable to the objection to the action of the class representative in submitting a proposed settlement to the District Court for approval. That proposed settlement was submitted to all the claimants and all claimants were given notice of a hearing on the proposed settlement where any claimant could raise such objection as she might have to the settlement. That procedure was followed by the

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[43]Judge Spencer Williams in *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1984), has well answered the argument that class certification must yield to the right of the individual plaintiff to control his or her case. He wrote:

> With surprising regularity, the primary opponents of class treatment of mass tort litigation are the plaintiffs' lawyers. These lawyers argue that the class action device was intended for situations when individual litigants would be incapable or unlikely to bring their own suit, due either to difficulties or expense of proof or the insubstantiality of the potential recovery on individual claims. Of course, this argument is totally specious; the critics' stake obvious. Every member of a federal class certified under Rule 23 must have a claim for recovery in excess of $10,000,00. Moreover, such an interpretation ignores the primary justification offered by Rule 23's drafters (con't.)

objecting claimants. At the hearing, there was extensive testimony taken with attorneys for the objecting claimants participating and being heard. After the hearing the settlement was submitted to all the claimants and an overwhelming majority (almost 95%) of the Class A claimants and almost 98% of the Class B claimants voted in favor of the settlement. Should a class certification and a class settlement be dismissed simply because a minimal number of the claimants voting objected? Must the federal courts be forced to try individually thousands of individual cases presenting the same issues of liability and causation year after year, with an intolerable burden on the court system and the judiciary and with great delay in the resolution of the individual claims, when there is a ready remedy for expeditious adjudication and fair recovery available for the full 100% of claimants through a properly constructed class action when the objections are so limited? We think not, and we dismiss this objection to the class certification herein.

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i.e., that the class action device was intended to foster judicial economy and efficiency. In fact, litigants are often deprived of this so-called "right" to control their own case by many of life's, as well as the law's harsher realities. 98 F.R.D. at 329-30 (footnotes omitted).

He added, by way of a note, this newspaper item:

> Almost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything but the injured plaintiff controls the litigation. See, *e.g.*, Chen, *Product Safety, Liability Suits: Few Guidelines*, L.A. Times, October 6, 1982, pp. 19, 26-27. 98 F.R.D. at 33 n. 23.

The appellants also find error in the certification in this case because the District Court, in finding compliance with (b)(1), failed to indicate whether it was certifying under (1)(A) or (1)(B). This objection is without merit. As Wright, Miller & Kane points out, it is unimportant whether certification is under (A) or (B) "inasmuch as actions under clause (A) and clause (B) are treated in the same manner for purposes of the other portions of Rule 23 and nothing turns on which provision is held controlling." 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1772, at 424-25 (2d ed. 1986).

In conclusion, we affirm the class certification herein. It is clear from the record that the determinative, critical issue in this case was whether Aetna was liable as a joint tortfeasor; it overshadows all other issues. Just as the military defense was central to the case in *Agent Orange,* so the question whether Aetna was a joint tortfeasor here was the critical issue common to all the cases against Aetna, and one which, if not established, would dispose of the entire litigation. *See* 818 F.2d at 166-67. Such an issue satisfies the commonality requirement of Rule 23(a)(2), as well as the other prerequisites of subsection (a). Moreover, the action qualifies under subsection (b)(1)(A) as well as (3). Manifestly the class action as a method of adjudicating that overshadowing issue is superior to any alternative form of adjudication. Further, the resolution of this issue, if required to be made in the thousands of individual suits in different courts, would involve the risk of varying and contradictory legal decisions on what was precisely the same factual record. The result would be chaotic. This is a situation which would unquestionably qualify under (b)(1)(A). It is of no moment that the action might also qualify under (b)(3) or that the District Court in this case may have certified this action under (b)(3) instead of (b)(1). In fact, it is "very common for an action to fall under Rule 23(b)(1) and one of the other categories in Rule 23(b)." 7A C.

Wright, A.Miller & M. Kane, *supra*, at 425.[44]Were we not satisfied that there was authority under (b)(1)(A) for certification, we could, it is true, affirm the decision of the District Court as permissible under (b)(3). We realize that it was under (b)(3) that *Jenkins* and *School Asbestos* made their class certification, and the District Judge could have followed those decisions. It is, however, of no moment that the District Judge did not grant certification on this ground; it would be appropriate for us to affirm if the decision of the court below can be affirmed on any ground supported by the record, whether raised below or by the parties in the proceedings before us, if one concluded that this action could not be certified under (b)(1). *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984); *Schweiker v. Hogan*, 457 U.S. 569, 585 (1982); *Stern v. Merrill, Lynch, Pierce, Fenner & Smith*, 603 F.2d 1073, 1093 (4th Cir. 1979); *Blackwelder v. Millman*, 522 F.2d 766, 771 (4th Cir. 1975); *Charley's Taxi Radio Dispatch v. SIDA of Hawaii*, 810 F.2d 869, 874 (9th Cir. 1987); *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 880 (10th Cir. 1984), *cert. denied*, 476 U.S. 1182 (1986). The basic difference between a mandatory certification under (b)(1)(A) and a certification under (b)(3) is that there is no opt-out requirement on the former but there is in the latter. As we have already pointed out, there is in practice, though not in express language, an opt-out provided by the right of a dissatisfied class claimant to choose a jury trial for resolution of her individual causation and damages claims. Accordingly, while the District Court might have certified this case under (b)(3), it acted in accordance with the general rule applicable in such a situation to

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[44]There is another reason for a mandatory certification herein as opposed to one under (b)(3). There is a settlement in this case;that settlement binds all members of the class. It does not mean, though, that any dissatisfied claimant cannot have a jury trial on her claim: she has a right of election either to arbitrate or to have a jury trial on her claim. Every claimant has all the rights she can expect of the judicial system.

certify under (b)(1)(A) (*See* C. Wright, A. Miller, & M. Kane, *supra*, § 1772, at 425, and other authorities cited on pages 46 and 47 herein). For reasons already given, we are of opinion that the District Judge had the right to base his certification on (b)(1). We accordingly affirm the class certification as made herein by the District Court.

We turn now to consider the appeal for the order of the District Court approving the settlement herein.

XIX.

Under *Flinn v. FMC Corporation*, 528 F.2d 1169 (4th Cir.1975), *cert. denied*, 424 U.S. 967 (1976), a case cited by both parties as the guide for our decision on this phase of the appeal, the review of the decision of a District Court approving a proposed settlement of a class action is one for "clear abuse of discretion." 528 F.2d at 1172. *Flinn* declares that the most important fact to be considered in conducting such a review is "whether the trial court gave proper consideration to the strength of the plaintiffs' claim on the merits." *Ibid.* The reviewing court should consider in evaluating whether the trial court had given proper consideration to the strength of the plaintiffs case "the extent of discovery that [had] taken place, the stage of the proceedings, the want of collusion in the settlement, and the expense [sic] of counsel who [had] represented the plaintiffs in the negotiation" in the record before the trial court. *Ibid.* at 1173. The trial court should also give proper consideration to the attitude of the class members themselves to the settlement. It is not, however, to be assumed that a settlement is "unfair or unreasonable because a large number of class members oppose it" or that the settlement "may only amount to a fraction of the potential recovery." *Ibid.* It would have been in order for the trial court to grant to any objector to the settlement the right to be heard, to cross-examine witnesses or to submit evidence, but the trial court may limit the proceedings to "whatever is necessary to aid in reaching an informed, just and reasoned decision," *Ibid.*

and specifically the trial court "should not 'turn the settlement hearing into a trial or a rehearsal of the trial.'" Ultimately, the rule to be applied is that

> [s]o long as the record before it is adequate to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated," and "form an educated estimate of the complexity, expense and likely duration of such litigation, . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise," *Ibid.*

If that procedure is followed, a trial court has acted properly in determining whether to approve the proposed settlement or not. We think that the District Judge in this case followed those principles in reaching his decision. Under such circumstances, he did not abuse his discretion in approving the settlement.

It is important to recognize that this case is closely tied in with the bankruptcy of Robins. Both this case and the Robins bankruptcy are before the same District Judge. Under the proposed settlement, the resolution of individual causation and damages for Dalkon Shield claimants seeking recovery from Robins and Aetna is through the same mechanism. The Robins Plan of Reorganization and the *Breland* settlement are intended to provide full payment of all compensatory damages suffered by all Dalkon Shield claimants who have properly filed claims. The Plan creates a Trust Fund which will be sufficient to achieve this goal. Neither the appellants nor anyone else has asserted that such fund is insufficient.[45] When the parties have funded the

[45]The failure of the appellants to contest the adequacy of the estimation on the basis of which the Plan of Reorganization was premised is understandable. After all, in 1981 in the *Dalkon Shield* litigation in 521 F. Supp. 1191 the value of Robins was said to be approximately $280,394,000; Robins, however, under the Plan is paying $2.475 million to the Dalkon Shield claimants, quite an increase (almost ten times) from the earlier figure of $280 million arrived at in 1981.

trust, Robins, Aetna and any successor corporations are relieved of any further liability, and this is proper since Dalkon Shield claimants will be paid by the Trust the full value of their claims. Aetna has made a minimal contribution to that fund. But that is not all that Aetna has done to assure the full payment of all Dalkon Shield claimants: It has provided an extra fund of $325 million to protect the Trust against any deficiency that may occur in the Trust Fund. That undertaking of Aetna is the "icing on the cake" for the Dalkon Shield claimants, who, when the Robins Plan of Reorganization and the *Breland* settlement are approved, can begin promptly to collect compensatory damages for their injuries. The Plan of Reorganization and the *Breland* settlement are interdependent. Failure of approval of either the Plan of Reorganization or the *Breland* settlement would derail hopelessly the carefully negotiated and crafted Plan and Settlement and leave the Dalkon Shield claimants to the vagaries, expenses and delay of further extended litigation. It is understandable that, under these circumstances, about 95% of the claimants who voted on the Settlement voted in favor. Such a strong showing of support for the Plan by those most interested should not be lightly disregarded.

Of course, this expression of the feelings of claimants cannot relieve the trial judge of his obligation to review and make his own informed and reasoned judgment on the fairness of the settlement. The most important consideration, as declared by *Flinn*, 582 F.2d at 1173, in reviewing a class action settlement, is whether the District Court gave proper consideration to the strength of the *Breland* claim on the merits. The District Judge, in reaching his decision in this case, had before him a record that had been accumulated over many years. He had the extensive discovery conducted before the Judicial Panel on Multi-District Litigation over a period of years. He had available the records developed as a result of the discovery conducted in the actions pending before Judge Lord in the District of Minnesota, as well

as the investigations and reports of the two masters appointed by Judge Lord. Counsel for the *Breland* plaintiffs had thoroughly examined in Hartford Connecticut, the files of Aetna, and in Richmond Virginia, Robins' files. They had made copies of the relevant items in such files and collated them in various volumes. These examinations by the *Breland* plaintiffs covered a period of several months and entailed the services of a team of lawyers numbering at times as many as seven or ten.[46] All this was brought to the attention of the District Court either by the filing of the requisite documents or papers themselves or by the testimony or representations during argument by *Breland* counsel. Some forty-two depositions were included in the record. The trial judge received exhaustive briefs and heard at length counsel on the legal aspects of the *Breland* plaintiffs' claim. He took the testimony of a number of witnesses in open court. The conclusion seems inescapable, in our opinion, that the District Judge conducted a most exacting inquiry into the strength of the *Breland* plaintiffs' case and stated an informed and reasoned conclusion on that issue.

It is the appellants' position, though, that the record will show that counsel for the class did not adequately investigate this case or conduct appropriate discovery. From the discovery already conducted before this suit was brought and the extensive investigation by counsel after this suit was instituted as already detailed, it appears to us, as it apparently did to the trial judge, the *Breland* Court had covered thoroughly the facts involved herein .[47] The report of the investigations by class representa-

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[46] As an aside, it should be borne in mind that Aetna is obligated to pay the class counsel. Thus, the fund available to the claimants will not be diminished by attorneys' fees for the class representatives' counsel.

[47] In this regard, it is important to review again the investigation conducted under Judge Lord's direction into the matter of Aetna's liability. That Judge Lord was concerned with the question of Aetna's possible liability is

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tives' counsel was set forth in a "Memorandum Settlement" submitted by Mr. Friedberg and Mr. Meshbesher as counsel for the *Breland* plaintiffs. Later Mr. Friedberg and other counsel engaged with him in developing the *Breland* case and in formulation on behalf of the *Breland* class the settlement, testified in person and were extensively cross-examined by counsel for the appellants. In addition, depositions of other counsel were submitted in the record. All this supported the statements in the Memorandum submitted in support of the Settlement. Counsel for the *Breland* plaintiffs aggressively and at great expense appear to have investigated every possible avenue for relevant evidence that might support the *Breland* suit.

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manifested by his order as reported in *Dean v. A. H. Robins Co., Inc.*, 101 F.R.D. 21, 26 (D. Minn. 1984). The authorized discovery extended specifically to the relations of Aetna and Robins in regard to the issues in this case. Thus, the court's order required discovery of, among other items, their documents, records, and memoranda:

> G. All correspondence, memoranda or other documents received or prepared by A.H.Robins or its representatives concerning the underwriting (purchase, cancellation, termination or analysis of past or future claims or premiums) applicable to the insurance or self-insurance of Dalkon Shield claims;
>
> H. All correspondence, memoranda or other documents received or propounded by A.H. Robins or its representatives concerning either partial or complete denials of coverage (or reservations of rights to deny coverage) by Aetna Casualty and Surety Company concerning Dalkon Shield claims;
>
> I. All correspondence, memoranda or other documents exchanged between Aetna and A.H. Robins concerning the safety or characteristics of the Dalkon Shield, the warning of Dalkon Shield hazards, dangers of defects or the recall of the Dalkon Shield at any level of distribution;
>
> J. All opinions, tests, examinations or studies regarding the safety of the Dalkon Shield and authored by experts or consultants retained in any of the individual lawsuits initiated against the Robins Company for the period June 1, 1974 to the present.

It is thus plain that Judge Lord and the Masters appointed by him did inquire into and investigate the strength of the Dalkon Shield claimants' case.

What we have discussed relates to the relevant factual record which counsel for the *Breland* plaintiffs zealously developed and analyzed and which was before the District Judge. We now look to the legal basis for the *Breland* suit against Aetna. There was no evidence that Aetna had any connection with the manufacture, labeling or marketing of the Dalkon Shield by Robins as developed either by Judge Lord's masters or by the *Breland* counsel (or, for that matter, the appellants). Nor is there any evidence that Aetna took any part in the decision not to recall the Dalkon Shield in 1974; that decision was made by Robins, apparently on the advice of its counsel. There was no evidence of the making of false misrepresentation of any kind to Dalkon Shield claimants by Aetna that involved any prejudice to such claimants and there was thus no basis for a fraud action against Aetna. This case is accordingly clearly distinguishable from *West v. Western Cas. and Sur. Co.*, 846 F.2d 387 (7th Cir. 1988), in which the agent of the insurance carrier was found to have induced the plaintiff West by false representation to delay filing a suit which could have been prejudicial to the interests of the insurer. Aetna had no dealings with any Dalkon Shield claimants, assumed no duty to such claimants and could not be liable to Dalkon Shield claimants under accepted insurance law. This was the very ground for the decision in *Bast* and *Campbell* discussed on pages 15 and 16 herein, and similar cases. The District Court in this case reached the same conclusion.

The only actions as charged against Aetna in this regard related to conduct of counsel paid by Aetna, as it was required to do under its contract with Robins, to represent the latter in certain Dalkon Shield litigation. This contention raises the question whether an insurance carrier in such a case can be regarded in law to be the employer of the counsel, for whose actions the carrier may be liable under *respondeat superior*. It is universally declared that such counsel represents the insured and not the insurer. Repeated opinions issued by the American Bar Associa-

tion [ABA], as illustrated by ABA Comm. on Ethics and Professional Responsibility, Informal Opinion 1476 (1981) declare: "When a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client." *See also* the following opinions in ABA/BNA Lawyers' Manual on Professional Conduct (1984): Connecticut, Informal Opinion 83-5, at 801:2059; Delaware Opinion 1981-1 at 801:2201; Michigan Opinion CI-866 at 801:4856. *See also Point Pleasant Canoe Rental v. Tinicum TP.*, 110 F.R.D. 166, 170 (E.D.Pa. 1986); *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, 736 (1984). The acts of counsel retained by Aetna to defend its insured Robins cannot be imputed to Aetna under any rule of *respondeat superior*.

It appears at another point in the appellants' catalogue of objections to the settlement to be the position of the appellants that Aetna knew of the deficiencies in the Dalkon Shield and failed to tell claimants of such. They would characterize this failure to be an actionable fraud. Such an argument assumes that an insurance carrier which, in reviewing with its insured a claim against the latter learns that its insured was at fault in some particular, owes a duty to advise the claimant of such dereliction on the part of its insured. Obviously, the carrier has no such duty and no court, so far as we know, has ever so held. *See Nipper v. California Automobile Assigned Risk Plan,* 19 Cal. 3d 35, 560 P.2d 743, 749 (1977) ("[w]e are aware of [no authority] which suggests that an insurer . . . either stands in a special relationship with the applicant or his potential victims, or alternately owes any affirmative duty of inquiry or disclosure regarding the applicant.")

The appellants, in their brief, refer critically to the alleged fact that certain damaging files of Robins were either destroyed or were planned to be destroyed. There is, however, no evidence, either direct or circumstantial, in the record to indicate that Aetna knew of or participated in such action. When it later did hear that

there had been some discussion of the possible destruction of certain Dalkon Shield records by house counsel, it is apparent, from the record on which the appellants base this assertion, that Aetna promptly demanded as a condition of renewing its policy that the Robins official who had allegedly proposed such plan be removed from any connection with the Dalkon Shield files in litigation. It is thus plain that Aetna neither participated nor did it later do any act to condone such proposed or actual destruction of records. This record is simply devoid of any evidence of any wrongful conduct on Aetna's part or participation in this incident on the part of Robins (assuming, without deciding that there was such an incident).

Nor did the appellants offer any evidence or point to any fact in the record which established or indicated collusion between counsel for the *Breland* plaintiffs and Aetna. *Breland* counsel aggressively pursued this case. They did so at great expense. After this exhaustive review of the Robins and Aetna records, it is obvious that they recognized they had found no "smoking gun" but it was not because they had not tried relentlessly to discover one. The negotiations for settlement that later developed appear to have been conducted on the part of *Breland* counsel with complete fidelity to their responsibility.

Finally, appellants discount the settlement as a "nuisance settlement." It was a settlement that involved a potential liability on Aetna's part of $425 million. Considering the expense of defending individually all the Dalkon Shield claims, the settlement figure might be thought of as the "nuisance" value of the *Breland* plaintiffs' claim to Aetna which had to bear the expense of such litigation, but this in no way taints the settlement, when the record indicates clearly that the *Breland* plaintiffs had but a tenuous, if at all, chance of success on this claim. Further, the settlement, coupled with that offered in the Robins Reorganization plan, assured every *Breland* plaintiff of full payment of her proven claim, with an added contingent provision supplied by

Aetna to protect against any possible deficiency in the Trust. Moreover, a settlement involving the acceptance of a possible liability of $425 million is not an insignificant settlement. Moreover, in every settlement, the amount is directly related to the strength of the plaintiffs' case. This is indicated by the settlement of $1,800 million of claims in the San Juan hotel fire for $100 million. *See* note 41. It is difficult to see what more the *Breland* action, if continued, could have availed the Dalkon Shield claimants. Without further elaboration, we hold the District Court did not err in approving the settlement of the class action.

The judgments of the District Court granting class certification and approving the settlement are accordingly

AFFIRMED.

ADDENDUM

APPEAL NUMBER 88-1755 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Mary Albert	252684	April Weeks-Korn	78397
Carol Angus	215751	Leonard Korn	78398
Judith Beaule	62242	Debora Lamont	96144
Janis Belcher	237565	Beverly McClure	80313
Daniel Belcher	237566	Katherine Maher	19424
Karen Belcher	237564	Elaine Nizza	228523
David Belcher	243035	Donna Oberg	77966
Melanie Bennett	183837	Diane Pinard	7113
Nancy Benson	191191	Jeanne Robey	237567
Jean Boeckler	122207	Paul Robey	237568
John Boeckler	122208	Pamela Saxby	78580
Janet Bruce	296254	Shellie Shapiro	78583
Melody Cannon	228522	Howard Shapiro	78582
Barbara L. Carr	20475	Sharon Lee Spern	187651
David W. Carr	244903	Rebecca Steinbach	281041
Helen Carty	78400	Jeannette Sweet	85890
Sandra Cassier	7647	Beverly Tonkin	184469
Patrick Cassier	7646	Donna Tshanakas	222583
Victoria Charnock	228521	Nicholas Tshanakas	222584
Ellen Chodes	42705	Daphne Whitmore	78910
Elizabeth Cote	26935	Linda Bisson	172492
Brenda Davis	111886	Anne Soucy	286513
Marion Du Ford	78493	Sally Adams	225908
Deborah Fallon	80309	Randy Adams	225886
John Fallon	80310	Charlotte Allen	227324
Dawn Gebo	7306	Charles Allen	225896
Janet Gregory	79226	Jan Allen	225897
Frank Gregory	79225	Barbara Bill Klinger	225899
Sarah E. Haskell	78399	Linda Brust	225323
Pamela Hockenhull	78909	Virginia Bryan Roberts	225901
Patricia Johnson	78581	Gwendolyn E. Buettner	70274
Mary E. Jordan	291790	Carolyn Campbell	225900

APPEAL NUMBER 88-1755 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Lynn Crosby	225902	Dayna McKendree	225887
William Franklin Crosby	233041	Diane Mance Zywotko	225892
Mary Kathryn Deemer	235677	Carol Mitchell	225891
John Deemer	225885	Susan Nehrig Cole	46096
Donna Faremouth	260787	Paul Nehrig	46097
Charles Faremouth	260788	Deloris A. Nicolaou	255933
Cindy Franco	225884	Sherry Peavy	225322
Fred Franco	231644	Kenneth Peavy	225488
Elena Friedman	225893	Flora Poe	109594
Darleene L. Frink	226609	Brenda Reilly	225489
Kenneth Frink	225954	Gerald Reilly	225490
Diane Goshorn	113174	Patricia Scolaro	225491
Christiane J. Guignard	219368	Edward Scolaro	235693
Linda Harre	225883	Wanda Joe Selvanik	225492
William Harre	225894	Michael Selvanik	225487
June Ellen Harris	225895	Janice Denise Simmons	7355
Carol Harterink	225903	Merrick Simmons	7354
Anton Harterink	225904	Martha E. Sims	225483
Rosanne Heard	225905	Eslyn South	189220
Jimmie Dale Heard	225906	Tracy Stancart	176376
Atha Henderson	225907	Debra Renee Thompson	225321
Jill Campion Huff	233339	Denise B. Wax	225946
Pamela Johnson	7353	Dan Wax	234731
Ted Johnson	7356	Rachael O. Thompson	200369
Wanda Lancaster	6020	Edwin L. Wilbur	202442
Deborah Jean Lenzi	225485	Sharon Malloy Wilber	01016
Betty Leobold	225486	Harold E. Kerkhoff, Jr.	200370
William D. Leobold	235694	Robert F. Grant, Deceased	200373
Susan Lippner	225890	Robert W. Adams	200368
Robert Lippner	225889	Gillian L. Adams	200367
Victoria L. McCord	225888	Mr. R. S. Shaw	285422
Cheryl McFarland	192508	Blanche M. Shaw	202439

APPEAL NUMBER 88-1755 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Donna M. Kerkhoff	200375	June W. Allen	285351
Kathleen A. Denise	62658	Marie Stella Allen	204671
Jim H. James	200366	Maureen Allen	88623
Beatrice D. Sewell	200374	Patricia M. Allen	283383
Kenneth R. Livingston	200883	Anita C. Almond	283385
Gloria W. Livingston	200372	Jacqueline A. Almond	205660
Harvey H. Friedman	200371	Lucia Alvarez de Toledo	226897
Arlene Whitaker James	200365	Elizabeth Amies	210903
Phyllis B. Puckett	225059	Doreen Amos	283390
Rhalda S. Friedman	202440	Joan Anderson	283392
Joyce F. Grant	202441	Lilieth C. Anderson	205673
Barbara A. Purvis	202438	Norma Anderson	230534
88-1757 Carolyn Abernethy	227352	Veronica Ann Anderson	203532
Barbara Ackerman		Trina Andrashi (Guessous)	283912
Agnes S. Adams	138145	Gillian Monaghan Andrews	226869
Deirdre Adams	304924	June Andrews	
Janet Adams	239853	Mary Annette	42298
Katherine Adams (Shaw)	24580	Jean M. Anslow	209353
Mary Adams	293804	Patricia Apsimon	202246
Olive J. Adams	205634	Leonie Archer	204551
Pauline Adams	209345	Yvonne A. Archibald	203552
Morenike Adejumo	283378	Brenda Arkless	203493
Georgette M. Adlington	204639	Patricia A. Armstrong	205636
Maureen Ahern	216306	Maureen W. Arnfield	283396
Annie Aitken	283379	Joan Arnold	283398
Sandra Aldridge	102304	Joyce Arnott	283400
Iona M. Alexander	215468	Shelia E. Arsenault	239840
Marie A. Ali	241349	Mary Asprey	207057
Christine Allen	209349	Janet Asson	282918
Emelda Allen	216276	Agnes Aston	203470
Gail Frances Allen		Barbara Atkins	299237
Josephine Allen	1437	Eunice M. Atkins	239806

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Patricia Atkins	231499	Eileen Barlow	204560
Betty Atkinson	207059	Sandra Barnard	283428
Sylvia Atkinson	283404	Elaine Barone	305202
Betty Auger	203586	Susan Bashford	48510
Susan Aultman	70842	Megan Bashir	283432
Margaret Averill	205687	Carole Baskin	283434
Judith Avril	283406	Pauline Basson (Reid)	209346
Trudi Axford	283408	Pauline Bate	226854
Patricia Baber	282961	Janet Patricia Bates	203509
Ram Dai Bacchus	205684	Pauline M. Bates	205642
Linda Backerman		Christine Bates-Brownsword	
Gail Bacon	42036	Heather C. Bathers	203513
Carole Badrick	239791	Rosezella Battle	
Janet Bailey	283414	Janet Baughan	216283
Peter J. Bailey	283415	Ruth Baynton	209196
Janet Doreen Bailey	283410	Karen Beach	283440
Patricia Bailey		Janine Maeve Beadle	105984
Irene Bain	283416	Madeline A. Beattie	203670
Hazel Bainbridge	283417	Chantal Beaudry	185103
Betsy Baird	283419	Janet Sue Beckwith	84367
Robert Baird	283420	Jean Bedford	215449
Christine Baker	283421	Jamila Begum	299223
Joy M. Baker	207061	Kaniz Begum	207975
Gillian Bambury	299222	Magsood Kahn Begum	203625
Rosalind Banfield	283423	Mary E. Behan	283444
Margaret B. Bannister	283425	Danielle Belanger	237706
Kathleen Barber	297495	Denise Belford	243649
Susan M. Barber	283426	Jennifer Belsham	283446
Alexandra J. Barbosa	49764	Helen Benham	15107
Patricia Barford (Hudson)	226898	Jacqueline D. Bennett	215444
Ann E. Barham	203639	Myrtle Bennett	283448
Jennifer Barley	207970	Sandra A. Bennett	249668

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Elizabeth A. Benson	283450	Loretta Jayne Bluck	283479
Doreen Bentley	226847	Sydney Blum	263517
Katreane Bernard	283452	Lynda Lee Bockler	80029
Cathryn Berr		Ruth Boddy	283481
Valerie Berriman	299224	Pauline M. Bolle-Mead	132591
Georgia Berring	207019	Carole G. Bolt (Wilkes)	203564
Patricia Berry	283454	Ann Bolton	283482
Patricia Bibbo		Winifred Helen Bolton	283483
Manzoor Bibi	299240	Shelia Bones	283485
Daphne Bickley	283458	Patricia Bonner	234413
Janus Bidawid	287358	Mary B. Bonthron	283487
Susan Bills	215463	Joanne Mary Booth (Stanton)	208023
Mairi Binns	283462	Lucey Bourne	203464
Deborah (Lynn) Bino	249212	Sylvannie L. Bourne	282903
Carol Birch	283464	Pauline Anne Bowater	239834
Margaret Patricia Birch	204564	Maureen Bowden	223638
Ann Bish	283466	Verlaine Bowden	283493
Norma Bishop	283468	Betty Bowers	209339
Tracey Biss	283470	Joyce Bowler	29264
Dorothy Blackham	216270	Pamela Bowling	283497
Anna Blaiklock	283472	Gloria Bowman	227354
Maureen Blair	15809	Winifred Boyce	205638
Mary Lou Blake	287359	Margaret Boyle	224824
Noreen Blake		Carolyn E. Bradburn	224857
Christine Blakemore	283474	Evelyn M. Bradbury	203682
Jennifer Ann Blanch	215462	Betty Constance Bradley	205632
Ann Blau	251536	Janet Alice Bradley	203582
Bonnie Bleiweiss	287360	Christine A. Brady	205647
Eunice Blewer	203675	Jennifer A. Brady	283502
Ethel Bloomer		Margaret M. Brady	203527
Patricia H. Bloomfield	283477	Margaret P. Brady	307353
Barbara Bloyce	195255	V. E. Braga	285684

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Linda Braid		Jennifer Brown	209335
Margaret Bramble	283504	Patricia Brown	216290
Pamela Ann Branden	283506	Patricia I. Brown	203475
Trudie Branford	283508	Susan Brown (Hinman)	84652
Norma Brannan	207063	Anne Browne	209175
Ida Brassard	227355	Pearline Browne	282904
Raymond Brassard	227356	Ann Broyles (Louise)	286359
Pamela Braun	237436	Jean Brunt	283527
Berenice Brennan	204586	Christine Bryan	217994
Cathryn Brennan	153187	Sophie Buamah	283529
Kathleen Brennan	283512	Moira Buchan	283531
Sharon L. Brennan	283514	Jo Ellen Buchanan	
Joyce Marylou Brett	209369	Jan Buckley	
Denise Brewer	294001	Elsie Buhler	291265
Mary Bridgeman	249546	Christine Bull	204638
Linda Bridgewood	205680	Marion Burford	153188
Diane Brimmer	231066	Marion Burgess	283538
Veronica Brimsted	234425	Patricia A. Burgess	283540
Julia Alica Brindley	283517	Sheenagh Burgess	283544
Sandra Brindley	283519	Joan Burke	283545
Denise Brinig	283521	Margaret Burke	216274
Elsada Bristol	231502	Audrey H. Burton	283549
Francesca E. Bristow	203525	Doreen Burton	203482
Patricia Bristow(Sutherland)	287461	Leslie Burton	283550
Shirley Britt	287361	Mary Burton	283551
Wendy Elizabetb Brooke	204644	Mavis Bush	283553
Jennifer Brookes	209186	Georjeau Busha	287398
Brenda Brooks (Mynard)	224845	Anne C. Butcher	217302
Richmal Broomfield	203521	Valery E. Butler	231495
Elizabeth Brophy	283523	Anne Butterworth	283557
Reta F. Brothers		Glynis Byatt	142274
Alma Brown	283525	Bettina H. Byras	84421

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Ann Marie Byrne		Margaret Ann Carton	207048
Rita Josepbine Byron	224849	Janet D. Cartwright	
Linda Cabena	249659	Lurline Carty	283582
Marjorie Cairney	84424	Marianne Carven	
Lorraine Cakebread	285686	Jacqueline Casey	283584
Susan Calder	207996	Jane Casey	203533
Dr. Fiona Caldicott	215451	Mary Sheila Cashmore	204598
Pauline E. Calladine	299163	Margaret Casserly	209364
Kathy Gallaway		Kathleen Cassettari	283586
Sandra K. Caller	283561	Carole A. Cassie	209264
Valerie Calvert	224834	Mary Frances Castle	283590
Christine Camp		Iona Castro	283592
Margaret Campayne	283564	Margaret A. Caswell	204642
Evelyn A. Campbell	283566	Christine Cave	203611
Hilma Campbell	203500	Ann Cawley	283593
Jeanette Campbell	283570	Ruth Evelyn Cecil	287366
Judith L. Campbell		Doreen Chalke	605808
Nancy Campbell		Catherine B. Challender	283595
Tina Campbell	207067	Edna Challinor	239784
Yvonne Campbell		Kathleen Chambers	283597
Mary Ann Canning	239795	Cheryl Chambers	241355
Valerie Canning	204670	Mary Cbampagne	287367
Else-Marie Carlander	283573	Raymond Champagne	287368
Barbara Carnaby	283575	Maria L. Chandler (Holt)	284877
Georgina C. Carnegie	283577	Shirley Chant	215397
Sandra J. Carpenter	287365	Patricia M. Chaplain	42281
Sandra M. Carpenter	207984	Jacqueline Chapman	224821
Bridget Teresa Carroll	283578	Lily Chapman	204664
E. Carroll	283580	Jose Charles	283603
Elizabeth Ann Carter		Marion Charles	282933
Margaret E. Carter	204597	Caroline O. Cbarlton	212449
Margaret Cartlidge	226899	Valerie Chattoe	216291

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Zohra S. Chaudry	204667	Linda Claxton	205663
Margaret M. Checkley	203569	Sylvia Clay	283623
Mary Cherrington	283606	Kerry Claytor	
Marcia Chessell	283608	Nancy Cleary	207020
Carol Chew	203612	Edwin Cleary	207021
Louise Ching	283610	Carol Faye Clements	287370
Janet Chioffi		Violet R. Clews	204660
Maureen R. Chittock	283611	June Cliffe	283625
Gillian D. Chitty	283613	Mavis Una Clinton	283626
Brenda Victoria Choat	283615	Joan W. Clulow	209206
Marilyn Chong		Irene Cobb	120967
Barbara P. Chorley	207974	Mary Ann Cockerton	283628
Dallas Christodoulou(Bonell)	255186	Christine Cocksey	283630
Madelaine Church (aka Canale-Parola)	283571	John Cocksey	283631
		Linsay Marcia Coben	283632
Alison Clark	247714	Diane Cole	283634
Ann Clark	203555	Janice Cole	283636
Doreen M. Clark	215457	Nikki Cole	287372
Gillian Clark	239808	Teresa M. Cole	209344
Juditb Ann Clark	283617	Betty Coleman	288372
Lee Christine Clark	283619	Mary G. Colley	204678
Pamela Clark	239816	Margaret Collins	203601
Patsy Clark		Theresa Coltman	283640
Sylvia Clark	216315	Greta Connelly	234526
Ann D. Clarke	241360	Margaret Conner	
Dorothy Clarke	203551	Pauline Conolly	63312
Florence J. Clarke	203540	Elizabeth Conran	283642
Joyce E. Clarke	216296	Karen Conti	285688
June Clarke	204652	Audrey Conway	283644
L. Clarke	283619	Beatrice S. Cook	207973
Olen Jane Clarke (estate)	283621	Catberine Cook	307352
Patricia Clarke	247048	Wendy R. Cook	226903

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Margaret K. Coomber	283646	Browyn Crawford	
Catherine Coombes	153068	Margaret Creber	153190
Elaine Coombes	605809	Margaret Credaro	285693
Christine Coombs	204646	Laura J. Cremin	217837
Beatrice Cooper		Lavinia Croft	283671
Dorotby P. Cooper	216294	Patricia V. Croshaw	85056
Gay Maxine Cooper	31333	Kathleen G. Cross	239864
Patricia Cooper	224837	Ursula Cross	265028
Theresa Cooper	283652	Ann Crossan	283673
A. Corbett	283653	Cynthia Crowley	303907
Josephine A. Corcoran	216330	Angela Culbert	283677
Lenore Corfe		Sandra Evelyn Culhane	307349
Christine Corfield	283654	Elaine Cumley	207022
Sue Corfield	170937	Mairead Cummins	12819
Margaret H. Corlett	203665	Marion Cummins	247715
Margaret Cornwell	286351	Philomena Cummins	195260
Nicolina Cortiglia	283662	June Rita Cumper	283681
Mary Cotterill	216288	Catherine Cunnane	239857
Josephine V. Cottingbam	283663	Dawn Iris Cunningham	283685
Maureen Coughlan	294002	Ellen Marie Cunningham	127234
Christine Ann Coulson	283665	Mary F. Cunningham	288491
Barbara I. Court	208014	Anne W. Curtis	239793
Alice Couture	231074	Marilyn Curtis	287374
Caroline Cowell	283667	Barbara Cuthbert	84491
Ursula Cowley	299164	Jean Daff	283687
Ira Cox	283669	Johanna Dahn	207995
Joyce E. Cox	188092	Shirley Joy Dallas	283689
Margaret Cox	205670	Debbie Dameron	
Janet Crabb	282905	Susan Mary Daniels	204641
Jackie Craig	287373	Lynda Dare	283691
Lynette Crannis	285690	Valerie J. Darneille	283692
Mary B. Craven	203579	Shelia Dart	155669

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Beryl Davey	283695	Elise J. Desabrais	
Christine E. Davidson	203598	Michelle Detrice	204578
Tina Davidson		Shelia Devaney	138170
Avril Davies	209191	Christine Devine	283718
Elaine P. Davies	204654	Barbara Dhalai	203545
Katherine Davies	239827	Patricia Diaz	283719
Patricia E. Davies	293756	Rosemary Dickson	283721
Joyce Davis	203635	Christopher Dickson	283722
June Davis	203628	Moira Dimecb	153192
Kaye Davis	153191	Joanne Dinatale	269143
Valerie J. Dawkins	203578	Linda Dingman	106964
Rosemary E. Dawson	283697	Gail I. Dixon	283727
Ann De Bont	203511	Jennifer E. Dixon	203517
Louisa De La Falaise	207981	Rosemary Ann Doble	226861
Dorothy P. A. De'Souza	283715	Mary Docherty	283731
Patricia DeAngelo	204388	Alison Gay Doggart	283733
Susan DeGavre		Margaret J. Doberty	212603
Carolyn DeRijke	207024	Mary Donnelly	205669
Bernadette Dean	205631	Annie Donoghue	209208
Jacqueline Dean	203562	Annie J. Donoghue	224833
Theresa Dean	305204	Joan Doogood	209616
Jacqueline K. Dean-Lewis	283699	Amanda Dore	283737
Pamela Deane	283701	Patricia Dorkins	234416
Mary B. Delaney	231497	Dorothy Douglas	283739
Janice Delany	283703	Clara Douglass	84510
Amanda Dellar	283705	Susan Dow	287377
Angela Dempsey	283706	Norma Dowd	142277
Pamela Denney	283708	Susan Dowie	226857
Joyce Densham	226881	Beryl L. Dowling	88572
Maureen Dent	283710	Winifred Downes	283741
B. H. Deputron		Audrey J. Downey	203623
Dianne Derrick	283713	Joyce Doyle	283743

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Sylvia M. Duffy	203575	Lorraine Ellis	208765
Joanne K. Dugdale	203658	Avril Dawn Elms	283764
Joyce Dunbar-Brunton	283745	Jennifer Ann Elvy	283766
Patricia F. Dunderdale	240973	Janet S. Emery	204595
Christine Dunleavy	227357	Sally P. Emms	283768
Patricia Dunne	202220	Cheryl L. English	285695
Mary E. Dunster	287378	Yvonne Enrigbt	283769
Hillary A. Durochia	41108	Doris Epstein	84532
Josephine E. Durrant	205689	Ingrid Eriksen-Wilson	207055
Linda Durrant	226809	James Eriksen-Wilson	207056
Michelle Dutot	283747	Janice Esom	283773
Patricia Dyer	142278	Nancy Rose Estry	283777
Margaret Ealand	295359	Caroline Evans	299165
Barbara Eastbury	239866	Mary A. Evans	283781
Brenda Easthope	209197	Sheila Evans	283779
Gloria Eaton	215464	Susanne Evans	212389
Patricia Ann Eaton	224852	Janet C. Everill	282906
Margaret Eatough	283750	Pauline B. Everitt	299244
Teresa M. Eatough	283752	Joan M. Eveson	226840
Jillian Ede	189032	Patricia V. Ewart	283783
Betheda Edmonds	249121	Janice Renee Fairweather	119690
Elizabeth Edwards	209202	Shirley D. Faloon	249569
Ellen N. Edwards	239848	Julie Falzarano	287380
Josephine A. Edwards	203515	Gwyneth Fanning	84541
Sheryl Edwards	283754	Ian Fanning	84542
Catherine M. Egan	226868	Anne Faraday	216304
Janice Egglestone	283756	Donna Faremouth	
Mary Rose Elgie	283758	Charles Faremoutb	
Vassoulla Elia	226845	Jerilyn Farinella	286358
Rosalind Elliott	142279	Mary Ann Farrell	283785
Gay (Brown) Ellis	231082	Ruth Farrell	287381
Eugenie Ellis	283760	Margaret F. Farrington-Wood	283787

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Sabina Faust	285696	Jeanette Fournier	270165
Sylvia Jeannette Feaver	283789	Anne Fowler	295363
Janet Fell	204593	Valerie Ann Fowler	283811
Dorotby M. Fellows	205656	Elizabeth Fox	226885
Teresa Maron Felton		Helen Elizabeth Fox	283813
Susan Lee Fenney	291638	Sheila Fox	283817
Paula Fenton	283793	Shirley Foxall	282965
Annette Ferlin	207028	Betty Frances	285692
Margaret J. Ferris	84556	Cristine Elizabeth Francis	207071
Margaret W. Ferris	224823	Dorothy Francis	282966
Christine M. Finney	204661	Rosemary D. Francis	283819
Heather Ann Firkin	283795	Sheila Francis	203678
Ann Elizabeth Fish	209327	Doreen Franklin	224828
Janice Fishburn	285698	Brenda A. Franklyn-Stokes	283821
Linda Fitzackerley	283797	Joyce Fraser	
Sandey Fitzgerald	84563	Carol Frederick	
Valerie Fitzgibbons	205674	Brenda Freeman	203571
Thelma Fitzpatrick	283799	Pauline Freeman	70777
Elizabetb Fivet	283801	Valerie Freeman	299225
Mavis Flastig	283803	Mary D. Freer	243652
Susan M. Flegg	203520	Sandra G. French	155772
Helen Fletcher	285700	Susan Frencb	283823
Alice Foran	249661	Annaliese Fritz	101994
Anne S. Ford	283805	Georgia Furminger	287383
Elizabeth Ford	142281	Lesley D. Fyfe	153193
Peter Ford	142282	Catherine Gaffney	223767
Margaret Ann Forrest	283807	Loraine Gager	153195
Geraldine Forristal (Mary)	148621	Sylvia Gale-Burkitt	283829
Avril Forsdyke	205688	Andrea Gallagber	239805
Irene C. Forshaw	283809	Gloria Joan Gallant	
Jean Foster	204571	Russlaine A. Galliers	231510
Joan M. Foulsham	204581	Judith Gapp	283831

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Barbara A. Garcia	203469	Heather Gilroy	
Alison M. Gardiner	299226	J. P. Ginesi	283855
Linda Ann Gardner	205651	Judy Girard	153196
Diane Garner	283833	Suzanne Girard	287387
Peggy A. Garrett	287384	Theresa M. Gladwin	204655
Betty C. Gauntlett	208003	Marcia Glenwright	207029
Kathleen Gavaghan	203499	Ann C. Glover	204566
Jean A. Gaynor	283835	Marie Glucksman	283856
Ann Gear		Jacqueline Glynn	203668
Christine A. Gebhardt	283837	Josephine Glynn	224822
Patricia L. Gee	283839	Rita Goddard	216307
Anna Marie Gent	293839	Jane Godfrey	257757
Valerie Gentry	283841	Teresa Lorraine Godfrey	283858
Rita Gerry	205640	Karen Goff (Smeaton)	285461
Sandie Gervasio	287385	Mercedez Gomez	283860
Joan Gethin	216331	J. A. Goodeve	283862
Patricia Ann Giannasi	283842	Marie Goodrich	245142
Carolyn Gibbins	283843	Joy M. Goodwin	283864
Margaret Gibbons	283845	Margaret P. Goodwin	205649
Gwyneth Gibson		Sandra Goodyear	283865
Joan Gibson	283849	Ester McBride Gordon	283867
Joy Gibson	285701	Barbara Gorringe	295353
Polly Gibson	270179	Margaret Gossmann	270183
Rosemary Gibson	216284	Lena Gott	143619
G. A. Gilani	226875	Dorothy A. Gough	216312
Brenda M. Gilbert	204563	Judith Goulden	283869
Alexandra Gildea	283851	Elizabeth Goulding	283871
Jean Giles	209328	Susan Goulding	283873
Lillian Giles	203661	Ann Govern	218087
Judy Gilgunn	283853	Philippa Gow	227358
Michael Gilgunn	283854	Susan Gower	202214
Raj Gill	208019	Rita Goyette	

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Donna Graham	225129	Luella Gulley	287389
Priscilla Graham	283877	Maureen Anita Haddon	203514
Valerie Graham	204672	Gloria E. Hadley	239854
Veronica Grant	282968	Leslie Haines	84614
Deborab Graves	84601	William Haines	84615
Beverly Gray	287388	Annette E. Hairsine	203681
Doreen Gray	283879	Elizabeth A. Hale	203478
Elaine Gray	249654	Sandra Haliben	
Mary Catherine Gray		Ann J. Hall	283913
Mary Charlotte Gray	234379	Jean Hall	283915
Pamela Gray	283883	Marjorie Hall	293758
Anna Green	283885	Mary P. Hall	283916
Robert Green	283886	Pbyllis Hall	283918
Euvine Green	239783	Sheila Hall	209185
Gillian Green	203669	Shirley E. Hall	283920
Hazel Janice Green	283889	Mary l. Hallahan	239807
Judith M. Green (Letts)	141351	Gillian Halter	203679
Lynette Green	205650	Razia A. Hameed	203617
M. Green	283891	Alison Hamilton	283921
Margaret Green	283893	Kathleen Hamilton	283923
Ruth Gregory	283896	Maryann Hammond	207031
Melcilyn Grey	209356	Clifton Hammond	207032
Betty Griffin	204592	Jill M. Hampson	
Joyce Griffiths	204662	Patricia R. Hancock	283924
Christine Grigg	203539	Susan Handy	203581
Jean Grinter	283900	Margaret Handyside	153197
Janet Pamela Grinyer	283902	Janet Hanks	
Linda Mary Grinyer	283904	Bridget H. Hanley	209180
Vilma Grizzle	204584	Wendy Ann Hannabuss	283926
Marie Ann Grogan	204679	Margaret Hannan	283928
Pauline Groombridge	283906	Shirley Hannon	305246
Brenda Ground	283908	Lorna Hanrahan	227359

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Evelyn Hanson	209326	Irene Haunton	249666
Rosemarie Hanson	11494	Patricia A. Haverty	203580
Patricia Ann Hara	181073	Barbara Hawkins	284838
Mary Harding	215453	Robin Hayden	287392
Pauline Harding	204549	Jennifer G. Haye	299228
Joyce Hardy (Fox)	283815	Jeannette A. Hayes	204673
K. Hardy	188150	Valerie Hayes	203653
Margaret E. Hardy	283931	Mary Josephine Haynes	203486
Ann Harman	205644	Rose O. Hayter	216286
Catherine Harouche	239835	Margaret R. Hayward	205657
Dianne Harper	284817	Marjorie Hayward	284840
Audrey Harris	283412	Florence Betty Haywood	284842
Hilary Harris	226860	Adair He	288414
Janet M. Harris	203602	Margaret Head	205546
June M. Harris	216209	Kathleen Margaret Heal	284843
Norma J. Harris	284821	Anne Healey	284847
Pauline T. Harris	284823	Susan Healey	284845
Anne Harrison	282970	Anne M. Hedges	245654
Astrea Harrison	284825	Linda Hemphill	
Barbara Harrison	284826	Jeanette Hasel Hencher	284849
Keith Harrison	284827	Dorothy A. Henderson	5294
Maureen Harrison	203604	Cellastine Hendley	204582
Pauline Harrison	203556	Jean E. Henry	239775
Elizabeth Harvey	284831	Stephanie Hensher	284851
Jan Harvey	231097	Christine Herbert	207977
Patricia G. Harvey	299040	Vera D. Herbert	226856
Rosemary Harvie	112718	Theresa Hewat	284855
Suzan Harwood	234423	Sandra Hewes	216311
Aileen Haskell	284832	Joan A. Hewett (estate)	284857
Margaret Hassan	203657	Cynthia Hewitt	227361
Mary Edwina Hassett	284834	Olive Hewitt	249669
Pamela Hasson	284836	Sheila Hewson	282909

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Barbara Ann Hewston	203594	Patricia Ann Holland	216281
Charlotte Hickcox	287393	Roseanne Hollingbery	142283
Bridget M. C. Hickey	284859	Anthony Hollingbery	142284
Marion Hickman	205683	Beverley Marie Holloway	284874
Hazel M. Highfield	284861	Susan M. Holloway	223710
Margaret Hiley	204621	Judith Holt	207033
Elizabeth Hill	299230	David Holt	207034
Gillian Hill		Deree Holton	286354
Kathleen Paula Hill	284863	Patricia M. Hope	284879
Sheila Hill	203607	Ruth J. Hopkins-Green	282473
Susan Hill	284864	Muriel Hopwood	224847
Lynn Hind	282972	Ann Horne	284881
Carole Ann Hine	203465	Sandra Horth	70824
Susan Hinman-Brown	14418	Marlene McKeown Hoskins	209340
Magdalena P. Hinton	284866	Marilyn Houlberg	287395
Margaret H. Hinton	216282	Jacqueline House	203468
Mavis Hinton	282897	Mary L. Houston	203663
Joan E. Hitchco	208025	Jean Howarth	284883
Sheila A. Hitchinson	239823	Rose Miriam Howat	284884
Pauline Hobby	207077	Janet Howells	284885
Dorothy M. Hobley	208013	Linda S. Hubbard	203568
Elizabeth Hodges	285703	Christine A. Hudson	215446
Valerie Hodges	284870	Anne Hughes (Odling)	
Michael Hodges	284871	Diana Hughes	142285
Helen K. Hodgetts	239773	Florence Hughes	291650
Joan M. Hodgson	284872	Kim Jean Hughes	153199
Patricia Hodgson	207991	Lesley Hughes	207994
S. Hodgson	203655	Mary Hughes	247718
Diane Hogan	227363	Philomena Ann Hughes	284887
Linda Holby	287394	Shirley Hughes	207972
Ginette Holdcroft	209329	Janet Humphreys	209198
Patricia Holding	203541	Frances Hunt (Howells)	284896

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Lydia M. Hunt	203531	Begum Jan	216313
Margaret R. Hunter	284899	Karen Jan	17184
Mary Elizabeth Rita Hurt	284901	Meewa Jan	239799
Dorothy Hutchings	153201	Jennifer Mary Jeans	284922
Margaret Hutchison	231108	Anita Jefferies	203491
Dennis Hutchison	231109	Caroline Jeffries	205698
Sandra Hynes	284903	Nusrat Jehan	282924
Ann V. Ikin	284905	Anne G. Jelbert	209351
Christine Iles	216305	Linda Jelfs	209199
Edna M. Ind	231504	Enid Jenkins	227365
Pauline Insull	203620	May Jenkins	284924
Margaret Anne Isdale	203508	Patricia N. Jenkins	239825
Margaret O. Ison	205699	Sandra Jenkins	209177
Janet Ives	284907	Shirley Jenkins	203503
Janice E. Iveson	284909	Tessa Jenkinson	284926
Megan Jacka	231511	Evelyn Jenks	284928
Cherri Jackson	287396	Anne Jennings	284930
June Anne Jackson	203528	Jane Jennings	284932
Suzanne Jackson	285705	Maureen Jennings	284934
Davina Jacobs	84681	Marie Jerrold	284936
Pbillipa D. Jacobs	282973	Mary Phoebe Jessop	284937
Susan Maxine Jacobs	217238	Angela Johns	24938
Irene Jacques	284912	Avril M. Johnson	204657
Suvinder Kaur Jagdev	282925	Beverly Johnson	
Angela James	153203	Elaine Johnson	284940
Anne T. James	205652	Josephine Johnsoh	224836
Audrey James		Patricia Johnson	239782
Barbara Anne James	284914	Patsy Johnson	204648
Catherine M. James	284916	Vera A. Joiner	226886
Christine James	284918	Anne Q. Jones	249662
Molly James		Barbara A. Jones	209345
Wendy M. A. James	284920	Carol A. Jones	284942

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Carolyn J. P. Jones	284944	Johanna Kelle herher	284967
Christine H. Jones	205629	Alice Kelly	204969
Claire A. Jones	226859	Doris Kelly	299249
Gail Georgina Jones	188155	Elizabeth Kelly	205703
Hilda Jones	204674	Isla Kelly	
Jacqueline Jones	203557	Jennifer Kelly	282974
Jane Jones	284946	Kristine Kelly (estate)	17628
Lesley K. Jones		Margaret A. Kelly	284971
Linda Jones	284948	Margaret M. Kelly	212429
Linda A. Jones	203561	Carol Kelsey	153204
Queenie Jones	284950	Karen Kelsey	231114
Valerie E. Jones	204677	Elizabeth Ann Kempson	226897
Jeanne Margaret Jordan	284952	Jacqueline Kennedy	204645
Suzanne Jordan	284953	Mary I. Kennedy	203471
Phyllis Joyce		Sandra Kennedy	287400
Barbara Jury	284954	Susan Kennedy	203593
Joyce Justice	287397	Sarah Kenny	239787
Deborah Kako	207035	Karen Luwanna Kerkhoff	207036
Marjo Kalo	131607	Patricia Mary Kershaw	284975
Barbara Kane	284946	Angela Kerwin	284977
Daljit Kaur	203498	Lal Zara Khan	203609
Gurdial Kaur	243654	Chandra Khiani	212359
Jagir Kaur	299041	Sue Kibbe	192611
Joginder Kaur	205690	Kathleen Anne Kidley	
Surinder Kaur	239838	Anne Marie Killingback	295361
Linda Kayne	284958	Valerie Killingbeck	284981
Mumtaz Begum Kazi	204565	Valerie G. Kilpatrick	203627
Brenda Teresa Keane	288421	Frances King	205681
Lynne Kear	284959	June M. King	204640
Betty Keeffe	203603	Marianne King	153205
Angela Keeling	284963	Sylvia Frances King	204663
Maureen A. Keen	23731	Gwendoline Rose Kingston	203616

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Mary P. Kinnavane	284983	Sheila Lang	257758
G. M. Kirkpatrick	284985	M. Langley	285014
Bernadette Knight	284987	Sandra G. Langston	203501
Christine Knigbt	284989	Beverly Lapacek	285708
Jean Knight	284991	Teresa Larkin	285015
Joan Knight	204590	Roseanne Lasorsa	199867
Carol Knott		Eileen J. Lathan	204651
Carole Knowles-Baker	255198	Ruth Lathan	203588
Estelle S. Kohn	287405	Maureen Launchbury	216317
Rosemary Komraus	287406	Lesley Lavelle	203467
Elisabeth Ellen Kondal	284995	Yvonne Lawes	207083
Katbleen G. Korpa		Michael Lawes	207084
Georgina A. Kosniowska	284997	Maureen A. Lawless	204659
Darshna Kou	204567	Elizabeth W. Lawlor	209174
Ronee Krakowiak	24230	Barbara Lawrence	285020
David Krasner		Betty A. Lawrence	237084
Irene Krause	287407	Christina Lawrence	282926
Eleanor LaFave	227367	Gillian Lawrence	285022
Ingrid LaTrobe	285017	Norma Lawrence	285023
Barbara Labrow	284999	Audrey O. Layton	226839
Debra M. Ladwig (Morchower)	231141	Dorothy Ann Lazenby	285025
Sylvia Laing	285001	Norma A. Lea	231505
Angela Lamb	285003	Christine Ann Lee	205654
Evelyn A. Lambert	285005	Elizabeth Lee	285027
Cecily Lamberti	62248	Pauline Lee	285029
Annette Lambourne	285007	Valerie S. Leeney	204594
F. A. Lancaster	285009	Rita Leese	299031
L. V. Lane	285010	Rose May Leese	285033
Shelley M. Lane	204694	Barbara Leigh	285035
Shirley Lane		Stella C. Leigh	226877
Susan Joyce Lane (O'Dwyer)	19002	Suzanne Levay	120889
June Lang	285011	Sandra E. Levitz (Lunner)	17084

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Alexandra R. M. Lewis	285038	Carol Love	285059
Ann Lewis	24878	Audrey Lowe (estate)	94949
Dorothy V. Lewis	203606	Christine Lucas	285063
Elaine M. Lewis	285040	Doreen Lucas	285065
Gabrielle Lewis	285046	Jennifer Lucas	
Gwendoline Lewis	299250	Elizabeth Luck	285067
Jacqueline Lewis	285044	Jennifer Lumley	283657
Janet Lewis	243655	Gillian Lumsdon	239781
Kathleen M. Lewis	224855	Christine Lutterman	285069
Lynda Lewis	285048	Gloria J. Lyford	58299
Mary Lewis		Sheila Lynch	285071
Pamela Mary Lewis (estate)	285042	Teresa Carmel Lynch	285072
Yvonne Lewis	203664	Deirdre Lynn (aka Kerrigan)	98009
Eunice Leyland	285050	Mary Lyons	299032
Christine Liggins	605810	Elizabeth MacDonald	132000
Patricia A. Limoge	287410	Wendy MacKenzie	285073
Raymond W. Limoge	287411	Dimity Mackie	285714
June P. Lincoln	285052	Elaine Macnamara	23847
Elizabeth W. Lindsay	224830	Jean Madden	285075
Carley D. Lines	285712	Jean R. Maddocks	285077
Jacqueline Littleford	224841	Mary Ann Maguire	282482
Lael Livak	287414	Sarab Maguire	243656
Frances Livingston-Ra	285056	Joyce E. Maher	209212
Anita J. Llewellyn	215460	M. Malik	285079
Janet Lloyd	204649	Shelagh Mallalieu	
Yvonne Lloyd	216285	Pamela Mallinson	241350
Bernadette Lodge	120792	Ann Malone	285081
Glennis Swift Loe	285710	Patti Maloney	270256
Maureen Loeffler	84777	Sheila Malsbury	226884
Sandra Longmire	249483	Christine Mann	
Vivienne Longstaff	285058	Pat Mann	285083
Carol S. Love (Palombi, C.)	285061	Valerie M. Mann	285085

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Yvonne Marchant	285087	Valerie Maw	285112
Elizabeth Marcotte	249225	Mary May	285114
Amy Marcus	207042	Renee Y. May	
Joan Mardner	205675	Carole McAllister	153206
Ester Margolis		Julia McAllister	287416
Gwyneth M. Marison	285089	Denni McCann	249235
Irina Markova	84797	Janet Martha McCann	285116
Dorothy Marsden	285091	Marie T. McCann	209209
Elizabeth Ann Marshall	285093	Shirley McCann	209348
Nola Marshall	285095	Christine McCarthy	285117
Sheila Marshall	208237	Donna McCarthy	287417
Gloria Martell	288343	Lloyd McCarthy	287418
Barbara Martin	285097	Susan McChesney	257759
Celia Martin	285099	Pauline McClenaghan	216300
Eileen Martin	216278	Janice McCrae	
Elaine Martin	285101	Irma McCray	
Elizabeth Martin	195931	Heather McCrory	28050
Glennis Maxine Martin	60021	J. M. McCullough (Brookes)	216323
Jillian M. Martin	247719	Christine McDermott	285118
Julie Martin (estate)	285105	Esmerelda McDonald	204668
Pamela Martin	216308	Rose Joan McEnery	282898
Gloria Martins	209355	Isabella Fiske McFarlin	
Lynne Maselan	227369	Amelia C. McGann	205677
Lachmi Masih	203642	Annie McGann	285120
Furruck Masood	209183	Linda McGeever	247720
Patricia Margaret Massocchi	285107	Sarah McGettigan	203574
Brenda Masters	285109	Jean McGill	285121
Vera Mather	219508	Hilary E. McGratb	215454
Carol Matthewman	285110	Patricia Marie McGrath	216318
Janet Maughan		Pauline McGrath	285122
Teresa Maughan		Ann P. McGuigan	224851
Martha J. Maund	285184	Rita McHale	285124

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Marilyn McKay	203629	Susan H. Middleton	207976
Yevonne McKay	285126	Amanda Midlam	29745
Patricia McKenna	285128	Yvette Milazzo-Brombacher	285143
Delsada McKenzie	299251	Leo Milazzo-Brombacher	285144
Edna T. McKnight	203548	Sheila B. Miles	226746
Sarah McKnigbt	285130	Sheila L. Miles	203497
Elizabeth McLennan	287419	Margaret M. Millage	204554
Mary T. McLennan	287420	Icilda V. Miller	299252
Keith McLennan	287421	Marion E. L. Miller	285145
Susan McLeod		Susan Miller	84835
Annie McManus	282910	Louis Miller	84836
Eileen M. McNally	241354	Hazel B. Millington	205694
Maureen McNally	207964	Janet Millman	243658
Eileen McNeill	285132	Sylvia Millns	285149
Sharon McNicol	287422	Pauline Mills	285151
Jeanette McQuaker	203518	Rosemary J. Mills	204653
Sarah McSweeney	285134	Dawn Milner	226858
Anne Meddings		Sonia Milsom	285153
Emma Meekins	287423	Clarice Mitchell	203680
Ted B. Meekins	287424	Frances Mitchell	285155
Mubarka Mehta	239796	Linda J. Mitchell	247721
Stella L. Mellor	282976	Veronica Mitchell	285157
Sandra L. Melnyk		Wendy Moger	299044
C. Mendonea	285136	Mary Theresa Molloy	239810
Susan Mero (Birtles)	10780	Stella Monday (Nathan)	302221
Helen Merrigan	285138	Marie Monk	285159
Ellen J. Merrins	239840	Elizabeth Ann Moody	295344
Bobbi Mersereau	84826	Margaret Moody	285161
Janet Messenbird	207085	Virginia Moody	261342
Maira Miczek	12311	Margaret Moon	285163
Elizabeth Maud Middlemist	285140	Jean Mooney	285165
Margaret T. Middleton	285142	Jacqueline Moorcroft	203526

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Ann Moore	203638	Heather Muco	285719
Claudia Moore	293210	Lynn Mudd	282978
Doreen D. Moore	285167	Morag G. Muego	285190
Henrietta J. Moore	285170	Susan Mulhall	241239
Jean Moore	285169	Sandra Mullany	204637
Jennifer Mary Moore		Theresa Mullen	216329
Leigh Moore	237518	Carol Mullet	285192
Vera L. Moore	204669	Sylvia A. Mulligan	285194
Elizabeth Ann Moran	285173	Norma Mumby	285198
Kathleen Moran	207043	Pamela Mumford	203492
Christine P. Moreton	203596	June Y. Munro	285196
Vera K. Moreton	209204	Gail Murfin	203472
Doreen M. Morgan	203479	Joan Mary Murfin	285200
Elizabeth L. Morgan	204562	Brenda Murphy	
Susan M. Mornington	207978	Deidre Veronia Murphy	285202
Edith Nkhala Morothoane	285175	Diana E. Murphy	205639
Jean Morris	207985	Jane Murphy	285204
Joan A. Morris	209362	Linda Murphy	121051
Mary A. Morris	299253	Wendy Murphy	285721
Maureen Morris	285176	Joanne T. Myers	
Shawn Morse	137391	Cynthia Nadeau	197219
Luisa Mosa	84847	Janet Naim	285206
Jack Mosa	84848	Marian Nankivell	285722
Valerie A. Moscow	285178	Deborah J. Nason	84858
Susan E. Moseley	239829	Rawza Nasser	231489
Betty A. Moss	204650	Delia Nassim	285208
Margaret Mott	287425	National Women's Health Network	6584
June Mottershead	285180	Winifred Neal	203554
Marcia Moulton	84849	Doreen O. Neale	285210
Mary Moulton	285182	Doreen Neary	203537
Susan Mowll	285186	M. T. Neate	285212
Catherine Moyes	285188		

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Thelma Needham	285214	Eileen Bridget O'Brien	
Nola Nelson	285723	Florence M. O'Brien	209195
C. A. Denise Neve	285216	Kathleen S. O'Brien	203649
Margaret Newboult	295355	Margaret O'Callaghan	243659
Kathryn Newbound	285218	Katbryn Marie O'Connor	287429
Ann Newby	208001	Connie O'Dell (O'Driscoll)	285236
Carol Ann Newell	226905	Marie O'Donoghue	224827
Jeanette Newman	285220	Margaret O'Flaherty	203560
Mildred Newton	285222	Esther Elizabeth O'Gorman	285238
Rita Newton	285224	Margaret A. O'Hagan	204604
Susan T. Nichols	285225	Yvonne O'Hara	285240
Mary Nieporte		Veronica S. O'Neil	282928
Patricia Nightswander		Carmel O'Neill	153212
Pamela Nightingale	285227	Linda C. O'Neill	203463
Mary Nisbett	203504	Norma O'Neill	204603
Rita Nobbs	285229	Kathleen O'Reilly	7119
Beatrice E. Nock	282912	Theresa O'Reilly	
Gillian Nock	204602	Timothy O'Reilly	
Joan Nolan		Susan O'Shaughnessy	227371
Josephine A. Norman	203570	Suzanne Okrent	285242
June Norman	203674	C. Oladipo	285244
Pauline Marie Norman	42317	Joan Oleskevich	
Barbara Normand	287426	Cbristine Oliver	205705
Kathleen Norton	203605	Mary Ollerenshaw	204605
Irene Notley	209343	Barbara Oreton	203618
Patricia Novikoff	183368	Patricia A. F. Osborne	285247
Mark Novikoff	183369	Patricia A. L. Osborne	203587
Marilyn Nuske	153210	Eunice Owen	28593
Sarah V. Nutley	285232	Gaynor Owen (estate)	285248
Susan Margaret Nuttall	285230	Jennifer Owen	285250
Susan Nutter	270855	Ruth Owens	
Glenda J. Nye	38262	Lisa Padilla	

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Elise Padmore	203603	Elizabeth Pellett	216336
Sarah Page	325462	Jennie Pelotte	287435
Eileen E. Palmer	204607	Sheila Pender	285270
Laurann Pandelakis	84888	Kathy Penfield	
George Pandelakis	84889	John Penfield	
Janette A. Panek	239839	Janice Penny	285272
Sheena Panton	285256	Jean Pennycook	106702
Ellen Pareis	287431	Catherine J. Pepper	209182
Madhu Ben Parekh	226888	Jennifer Pepper	287437
Barbara Parker	287433	Julie Jean Mary Percy	285274
Maureen Parker	285259	Annette June Perkin	285275
Sandra Parker	210461	Sally Perkins	285277
Christine Parkes	204609	Antoinette Perks	285278
Maureen Elizabeth Parkes	227107	Lesley Perks	208017
Susan Ann Parkin (Disney)	283723	C. Perry	285280
Rachel M. Parkins	203549	Gilde Perry	285282
Rosemary P. Parkinson	205679	Susan Peterken	207088
Marlene K. Parry	209357	Johanna Petersen	84904
Mary Parry	285260	Kathryn Peterson	84905
Kathleen M. Partridge	203507	Sharon Pfeifer	287438
Patricia Partridge	285262	Diane I. Phillips	208008
Monica Patel	203572	Pearlyn Phillips	299034
Jacqueline A. Patterson	285264	Erica G. Philpotts	226904
Janet Pattison	285266	Judith Phipps	285284
Jennifer Patullo	153213	Tina L. Piddington	216302
Bianca Pauza	153214	Susan Myra Pilton	295357
Barbara Payne	205665	Linda Pinchera	285286
Susan Payne	240985	Sylvia Pinfield	209352
Gillian Peach	224829	Sheila Pinner	216303
Judy Peacocke	30956	Marilyn A. Piri	209368
Diane S. Pearce		S. K. Pitman	285288
Mary Pediani	285268	Linda C. Pitt	209341

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Lynne Plant	285290	Linda S. Prince	203577
Rhonda Plant	153216	Jennifer Pritchard	285313
Lyndon Plante	84914	Hazel M. Prosser	241357
Christine M. Pointon	285292	Jean Lesley Prosser	204610
Maria Pollakis	120891	Jennifer Pugh	207966
Penelope Pollock	285293	Elizabeth M. Purnell	102096
Joanne Pomeranz	287440	Andrea Quail	7042
Murial Poole	204606	Norma B. Rabaiotti	285315
Wendy A. Pope	285295	Stella J. Rabbits	204596
Heather Popham	285297	Diana Rabone	226907
Diana M. Porter	239779	Lucy Raby	285317
Helen Porter	285299	Sheila Race	
Pauline Porter	285301	Naomi L. Radovan	207999
Eileen Potter	209319	Gladys Ragland	291649
S. Pottinger	285303	Sharon R. Rainbird	203495
Alice J. Potts	282949	Jean Rainville	287443
Margaret Pover	285307	E. M. Ramsay	282982
Everett Pover	285308	Elaine Randall	224848
Christine Powell	216275	Margaret W. Rankin	207967
Margaret Powell	285309	Gayle Raphanel	84926
Pamela Powell	299233	Lynda J. Ratcliff	28152
Margaret Power	205648	Ivy Ravenhill	215445
Farida Pradhan	287441	Janet Rawe	207046
Anne Pratt	285310	Pauline Reading	285320
Jean Preedy	149520	Sheryl Reardon	285322
Andrea Prentice	227373	Janine Records	287446
Audrey E. Price	249667	Katherine Reece	285326
Mary Price	207090	Patricia A. Reece	209363
Maureen Price	234415	Diane Reed	203590
Martine A. Prichard	203613	Gillian P. M. Rees	285328
Agnus Primus	203615	Mary Ellen Regen	216292
Alvarene Prince	203543	Deirdre Reid	241351

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Heather Reid	285330	Anne Roddic k	285363
Julia Reidy	606331	Christy Ann Rodgers	227374
Margaret Ann Reidy	265562	Norma Roe	203502
Helen Remphrey	153217	Caroline Roeves	285364
Coral Rendall	285332	Annie Rogers	299259
Mary Reohorn	285334	Kathleen Rogers	285366
Mary Ann Restall	216299	Peter Rogers	285367
Jennifer Revis	285336	Linda Rogers	208247
M. O. Reynolds	285338	Margaret Rogers	204611
Brenda Rheeston	203524	Mary Linda Rogers	208247
Catherine Rhodes	239802	Roberta Rogers	
Christine Rice	257760	Maureen Rood	285368
Carol Richards	285340	Janet Rooney	285370
Elaine Richards	239859	Joyce Rose	181805
Angela Patricia Richardson	285342	Edna Ross	285374
Jean Richardson	285344	Jacqueline Ross	188921
Pearl Richardson	203538	Jean Ross	257761
Angela Ride	224839	Kathleen M. Ross	285376
Joyce Rigby	231500	Rutb M. Ross	285379
Emma Rikert	106182	Pauline Ross-White	285380
Sandra Robbins	285349	Hilary Caryl Rothwell	285382
Susan Robbins	216289	Valerie Round	239817
Valerie Roberston	285353	Isobell H. Rouse	205680
Margaret Roberts	207048	Janice Rouse	295341
Margaret R. Roberts	285347	Kerry A. Rowe	285726
Linda Robertson	287448	Barbara A. Rowley	205655
Peter Robertson	287449	Christine Rowley	285386
June Rose Robinson	209200	Rita Roxburgb	285388
Pamela A. Robinson	285359	Angela Roy	84954
Sheila Robinson	285361	Dahn Roy	84955
Susan Robinson	209324	Nora P. Roy	215441
Rosemary Robjohn	282985	Roseanne Ruiz	

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Aldolphe Ruiz		Mary Schobert	249318
Patricia K. Rumens	285390	Cheralyn A. Schofield	
June K. Russell		Peggy L. Schrader	
Miriam Russell		Maria J.H. Schreuder	285400
Diane Rust	285392	Elizabeth H. Schwartz	203483
Celia Ryan	299235	Amanda Scott	285403
Maura Ryan	248356	Philip Scott	285404
Anna Ryder	84964	Joan Scott	285405
Irene Sabbar	231507	Lydia Scott	207049
Paula Sacchinelli		Martha Scott	285407
Nicholas Sacchinelli		Rowena Scott	285409
Kathleen Sackett	282953	V.A. Scott	282987
Mari Said	248238	Vera Ellen Scott	205691
Diane Sait	285394	Doreen M. Seager	205664
Marcia Salmond		Elizabeth Seagrim	285730
Sheila Salt	231508	Ann Seamarka	285412
Janet Salzman	204521	Monica Ann Sedgwick	227377
Linda Sameja	239845	Sandra A. Sedgwick	226835
Fiona M. Sandercock	285728	Christina Ann Seery	204636
Rhoda H. Sanders	51169	Margaret M. Seery	209187
Helen Sanderson		Sheila Selling	285416
Alwyn Sandiford	285396	Gabriele R. Semrau	285418
Dr. Patricia M. Santer	285398	Betty I. Seviour	203564
Jane Sasonow-White	291643	Eileen Shanahan	204557
Jane Savoie		Cynthia Sharp	
Ann E. Sawyer	241356	Dawn Sharp	84986
Helga Scaiffe		Janet Sharp	249326
Dawn M. Scarrott	204634	Sandra Marie Eileen Sharp	170983
Yvonne Schaloske	227375	Alison M. Sharpe	226872
Jacqueline Schaverein		Patricia Sharpe	307552
Janet Schebella	84973	Ann P. Sharples	282915
Betty H. Schilling	209358	Carol Ann Sharples	216321

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Barbara Shaughnessy	203542	Valerie Simms	282916
Blancbe Shaw		Angela Simpson	208026
Helen Shaw	204552	Ann W. Simpson	285444
Rosalind Shaw	239833	Lynn Simpson	285446
Susan J. Shaw	285425	Moira Simpson	285448
Linda Sheedy	204635	Mary Ann Sinfield	285450
Jane Sbeehan	282988	Anastasia Sinnott	203648
Mary Sbeehy	285427	Penelope Skelbeck	285452
Patricia Sheekley	285428	Christine Skelton	
Sheila Sheldon	285430	Patricia Skidmore	285453
Andrea Shelling	285434	Beverly Skwira	
Elaine Shepard	83479	Anita D. Slater	204633
Jennifer Shepberd	203519	Diana Slater	285455
Shirley Shepberd	203474	Jobn Slater	285456
Mary Jacqueline Sheppard	209322	Gail S. Slater	295348
Dorothy E. A. Sheridan	285436	Gillian Slater	285457
Janet Shields	207050	Susan Slater	224831
Esther Shifra	207960	Valerie K. Slayter	203659
Marquerite Alwyn Shorland	285437	Margaret Sleator	285459
E. N. Shorrock	285438	June Small	216337
Anita Shurey	285439	Marjorie Small	205702
Rita Sidaway	299260	Janice Smart	231509
Mary Elsie Sidebotham	282955	Jean Smethurst	285462
Nirmal Sikand	216334	Catherine Smid	287455
Beverly Anne Silk	248266	Charles J. Smid	287454
June Sillitoe		Ann J. Smith	203476
Mina Silvester	209178	Barbara Smith	287456
Barbara Simkiss	226895	Carole Ann Smith	285464
Anne M. Simmonds	285443	Christine Smith	203480
Susan Simmonds	208027	Christine A. Smith	204570
Lynn Simms	215447	Cynthia Diane Smith	285465
Norma Simms	215443	Elizabeth Smith	285467

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Frances M. Smith	207092	Christine Torode Spencer	226876
Glenis M. Smith	209211	Jeannette Spencer	205682
Holly L. Smith	285469	Susan E. Spencer	209360
Hyacinth Smith	203597	Sylvia Spencer	285488
Jean Smith	210948	Clarinda M. Spinelli	287458
Josephine Martina Smith	285471	Patricia Squire	224832
Joyce Smith	215465	Margaret R. Squirrell	285490
June Smith	285473	Catherine Staban	
Lucille Smith	208005	Joy Staley	285492
Mabel Iris Smith		Caroline A. Stanbury	285494
Margaret Smith	216319	Stepbanie Standberg	287459
Marilynn Smith	285474	S. C. Stanford	208018
Mary R. Smith	226864	Frances Stanley	203676
Maureen Smith	216320	Margaret R. Stanley	239861
Norma Smith	203608	Suzanne Stanley	209201
Patricia K. Smith	204632	Laila Stansfield	142287
Shirley A. Smith	285476	Daphne Startup	207094
Thelma Smith	231493	Janette P. Stebbens	209207
Theresa Smith	207982	Anneliese Stedeford	226887
Wendy Smith	203490	Jacqueline Pamela Steele	226708
Terrina Snelson	239842	Mary Steele	285498
Galina Solodchin	285477	Marta Stefan	285500
Margaret J. Songhurst	285481	Bernadette Mary Stephens	285501
Mairi Sosna	285482	Cristine M. Stevens	17476
Marjorie P. Southan	207965	Jacqueline Stevens	194934
Leslie Southwell		Pamela M. Stevens	204550
Ronald Southwell		Maureen Stevenson	234419
Mildred Ann Spain		Jean Stirling	285506
Andrea Spalding	204568	Shireen Stoddart	285507
Elsa A. Spaull	204630	Charity Norton S. Stokes	223635
Alice Speid	285484	Barbara Margaretta Stone	285508
Eileen Spence	285486	Laurie Stone	

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Sheila Stone	285510	Jean Alice Tart	203558
Debbie Stone		Christine R. Taylor	203650
Sbeila Stoneman	285512	Elizabeth Taylor	285530
Mary Stovell	285514	Jean Taylor	285532
Betty Clare Streator		Linda Taylor	187656
Sheila Strong	203633	James Taylor	183998
Linda Stuchbury	285517	Marilyn Taylor	285533
Karen Sturtivant	285516	Ruth Maureen Taylor	285535
Doreen Sullivan	285519	Susan Taylor	
Justine Sullivan		Debbie Teague	102641
Regina Sullivan		Susan Teece	285537
Valerie Sullivan	285521	June C. Tetley	239788
Elizabeth Summerfield	203466	Mary A. Thatcher	153218
Diana M. Summers	239786	Joan Yvonne Theriault	105067
Joan Sumner	203530	Audrey Thomas	204601
Ellen Surlak	207052	Clara D. Thomas	22684
Hansaben Surti	249664	Dorothy Thomas	204627
Christine I. Sutcliffe	203535	Pamela M. Thomas	208029
Helene Louise Sutcliffe	285523	Shirley Thomas	
Maria Ann Sutherland		Veronica Eileen Thomas	285539
Anne Sutton	226841	Maureen S. Thomason	204624
Mary Rose Swain	204573	Anne S. Thompson	249538
Elaine Sweeney	224853	Beryl Thompson	285541
Greta Sweeney	226874	Claire M. Thompson	
Susan Sweeney	285525	Gaye Thompson	293998
Carole Swingell	203660	Janis Thompson	285543
Deborah Syme	287462	Jayne E. Thompson	209184
Lorraine Syme	285527	Linda Thompson	
Evi Szakolcai	287464	Nora Thompson	153220
Judith Taber	8595	Molly Thorkildsen	270937
Maureen Tabrett	285529	Pauline Thorne	204623
Alexandrina Taggart	239768	Janet Thornley	209332

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Freda Thurgood	204587	Janet Underwood	205672
Vivien Tierney	54010	Jill M. Urwin	285561
Kay Tilbrook	216268	Ann Vallantine	285563
Mary Frances Till	285545	Audrey Valunes	
Susan Till	209333	Myra Jane Van Heck	142289
Charlotte Timms	207053	Beryl M. Vann	285565
Carole Tod	287468	Maria Vassiliou	285567
Christine Tombs	239794	Annette Vaughan	209370
Susan Elizabeth Tomlin	285547	Gwendolyn Vaughan	285569
Susan Tongue		Julie Vaughan	285571
Elizabeth M. Toomey	285549	Dorothy E. Venn	285573
Georgina Toon	239850	Suzanne Venus	285735
Margaret M. Torres	285551	Jane Veress	285575
Sarah Trainor	2398'5	Joyce Vickers	285577
S. C. Trendall	285555	Patricia M. Viggers	208016
Shirley P. Trimble	239819	Rossana Villella	207098
Christine Trueman	239865	Ann Vincent	209336
Glenda J. Truman	605813	Janet June Vincent	203600
Erica Tubb	285733	Nerelyn Virgo	215456
Esther Tuckley		Jillian E. Vodden	299262
June A. Tudor	241353	Christine Ann Voisey	285579
Janet M. Tuffin	257763	Dilys C. Vokes	204619
B. M. Tunnicliff	285557	Susan Volman	249370
Mavis Turburfield	153284	Rosemary Vukmanich	287470
Dorothy Ann Turner		Sheila Wadham	295874
Irene S. Turner	231501	Janice Wagoner	
Jackie Turner	285503	Catherine A. Wain	
Maureen Turner	285559	Maureen Wainman	204577
Doreen Twedell	207096	Joan M. Waite	209354
Susan B. Tye	149551	Elizabeth Waite	285581
Mary B. Tyler	204620	Elizabeth Wake	285583
Maureen A. Tyler	299236	Patricia Waldie (Knowles)	184784

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Barbara M. Waldron	205474	Donna Watkins	285404
Janet Waldron	209350	Margaret P. Watkins	203632
Denise Mary Wales	285585	Angela Watson	285608
Angela Ann Walker	234007	Gillian Dorothy Watson	67177
Caroline J. Walker	205645	Kim Watson	299269
Linda S. Walker	216314	Linda M. Watson	285610
Marjorie Walker	234417	Annette Williams	226871
Mary Walker	207100	Christine Williams	209192
Pauline Walker	285587	Colleen Ann Williams	
Valerie Walker		Gaye Williams	153224
Patricia Wall	205662	Jeannette Williams	181793
Dawn Wallace		Judith Williams	248182
Dorothy Wallace	285591	Mary Williams	207054
Sue Walliser	208930	Rosalie Williams	3450
Dorothy Lofthouse Walmsley	285593	Susan I. Williams	204613
Marlene Walmsley	208020	Sheila Willis	215440
Mary Walmsley	285596	Denise A. Willmore	204617
Harriot Walsh	282917	Jennifer Wills	285737
Kathleen B. Walsh	205635	Alison J. Wilson	285637
Pauline Walsh	203672	Barbara Wilson	285639
Carole Ann Walton	203534	Dr. Janet Wilson	295351
Veronica Warburton	285600	Janis Bell Wilson	285641
Ellen M. Ward	203671	Kara Jane Wilson	285643
Joylon Ward	209342	Louise Lorella Wilson	285644
Julia Ward	18381	Margaret Wilson	203510
Margaret Ward	204618	Maria Wilson	285646
Dawn Warfield	204561	Marlene C. Wilson	153226
J. Wark		Mary Rose Wilson	285648
Barbara M. Warrilow	204615	Phyllis Wilson	285649
Barbara Waterhouse	305472	Susan L. Wilson	285651
Beryl Waterhouse	285602	Sylvia Wilson	285653
Carol Ann Watkins	204616	Eileen Winant	285655

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Joan Winder	285657	Sheona York	208004
Janet Windibank	265607	Bernadette Young	605814
Beatrice Gail Windsor		Diane K. Young	270978
Dale Francis Windsor		Ingrid Young	216298
Marlene Winfield	285661	Jolene Young	
Hazel M. Winter	285662	Leslie Young	285682
Hazel D. Winter	208009	Jill B. Zagurskas	216279
Claire A. Wintertingham	285664	Josephine Durkan	606285
Florence Wisener	287476	Nancy Ewing	325934
Ann Withington		Sarah Fleming	245549
Linda Wolstencroft	285667	Ellen Goldberg	292906
Linda M. Wontor	7989	Margaret Elizabeth Haines	265591
Carol Roma Wood	285671	Yvonne Hall	36894
Joan M. Wood	243661	Rosa Halperin	
Mary M. Wood		Virginia Henry	
Sandra Wood	226851	Serene Jenkinson	9392
Barbara Woods	285673	Dorothy Lanier	
Helen Woodward	285674	Shelley Irene Lane	
Hilary D. Woodward	240984	Joan Leithead	
Jean M. Woollaston	239824	Winifred Lewis	209155
Joy Ann Workman	239797	Hilary Margaret MacDonald	226700
Joy Lee Worle (Lee)	285028	Sara MacLurg	
Ellen Worlledge	285677	Barbara Malson	264744
Carol A. Worrall	209321	Margo Mancusi	
Barbara Wright	205671	Amy McLaughlin	
Patricia Wright	142290	Khaleelah AbdulBadee	270695
Rosemary Wright	208012	David Adams	270819
Jackie Wyartt	203643	Mary Ellen Adams	270820
Audrey Wyatt	21068	Khadijah Ali-Bey	171411
Jennifer Wyatt	239826	June F. Allen (Rusnak)	270734
Barbara Yates	209347	Linda Diane Allen	19674
Vicki Barbara Yerby	276081	Theadora Averiett	152808

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Laura J. Baldwin	270672	Alma Davis	270674
Sandra Ann Barcus	270818	Bertha Davis	270683
Deborah Lynch Barton	189756	Brent Davis	270673
Pennicia Beasley	235592	Linda Sue Davis	6150
Paula Kaye Bender	190653	Shirlean Dean	129854
Patricia Bevan	17578	Kathryn M. DeChant	270694
Rebecca Ann Bishop	168927	Patricia Devereaux	319244
Sherri Ann Blackford	18081	Ronald Orient Donatelli	270676
Alan C. Blake	270816	Virginia Donatelli	270677
Beverly Jane Blake	270817	Marquita Dotson	270696
Celia Borack	270815	Doris Dove-Lucas	270726
Robert Borack	270814	Gail Maury Draper	270668
Linda Sue Branden	270714	Dean Duffey	270809
Wilhemina Brinson	45805	Susan Duffey	270808
Renee Brownlee	170570	Barbara Eccles	24447
Regina Butin	137344	Louise Echt	35557
Jeanette Cave	137805	Letha Naomi Elkins	37459
Ronald Cerny	270811	Ernest S. Ertel	270719
Sandra Cerny	270812	Linda Ertel	270718
Joyce Cbristopher	270699	Marilyn Feinberg	270725
Anthony J. Cirino	270717	Elva Ferguson	174987
Virginia Cirino	270716	Beverly Fisher	270712
Vicki Clifford	8660	James Fisher	270713
Nancy Cobedesh	10437	Sandra Foland	270669
Charlotte Coffee	270810	Ruth Frame-Adams	270665
Mary J. Colaric	225183	L. C. Frame-Adams	270688
Fannie Coleman	123393	Karen Frazier	85808
Cynthia Ann Collier	270681	Claudio Gallo-Godoy	270806
Melvin D. Collier	270680	Sheila Gallo-Godoy	270807
Anita Cummings	151453	Barbara Galloway	270731
Ellen J. Curran	270723	Melvin Galloway	270732
Margaret F. Czarnitzki	270709	John P. Getker	189543

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Susan Getker	189842	Judy Jarzembak	181641
Barry Gibberman	270804	Ginny E. Johnson	189606
Nancy Gibberman	270805	Daniel S. Jones	270708
Judy Goldstein	168393	Debra Jones	270670
Zenovy Golembiowsky	270803	Katrina Jones	270707
Audria Golembiowsky	270802	Donna Elaine Jordan	189609
Cynthia S. Goodwin	270800	Linda Kamandulis	270720
Arthur Griffin	270801	Michael A. Kamandulis	270721
Valeria K. Griffin	270800	Jo Ann L. Kellam	270740
Deborah Hanna	9012	Susan Kennedy	270792
Donna Harper	237965	Linda Kimbleton	270742
Laura Healey	189603	Henry Kimbleton	270743
Michael Healey	189602	Betty Ann Moore	270705
Billie Lynn Hill	270692	James Moore	270706
Claudia Hill	27751	Marianne Moore	270739
Charles Hitner	89604	Phyllis A. Morrison	289230
Valdee D. Hitner	189605	Sbirley Mullins	194004
Trina Holloway	270703	Pauline A. Newton	264311
Felton Holloway	270704	Eva Nell Nicely	17297
Adeline Holt	270798	Marilyn Nickerson	270684
Ralph Davis Holt	270799	Grace Noble	86994
Judith Ann Hopkins	270797	Avonell Mays Norman	84217
Johnnie Howell	308685	Judith Oskowski	270679
Ruby Howell	270711	Leonard Oskowski	270678
LaVerne Hunter	270796	Renee Owens	270722
Nelson Carver Hunter	270795	Sheryn Janette Perry	270702
Joyce Hurst	270793	Sandra Pertee	270663
Thomas Hurst	270794	Virgil Pertee	270662
Carol Jacobs	301415	Gail M. Peterson	270729
Edward Jakubs	270736	Gary G. Peterson	270730
Linda Jean Jakubs	270735	Fannie L. Phillips	4175
Mamie Delores James	270671	Jefferica Poindexter	270667

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER	
Patricia Pollard	14719	Helen A. Smith	190107	
Robert Powell	270775	Wayne Smith	270825	
Sharon Powell	270774	Wanda Denise Stanton	190099	
Gary W. Reece	270772	Barbara Strowder	270765	
Judith Ann Reece	270773	David Sturgeon	270764	
Margaret G. Reid	129847	Joann Lee Sturgeon	270763	
Marian Reid	270689	Rayneen Tisovic	170896	
Jenny Reliford	270771	Pamela Townley	198575	
Sharon L. Richard	270697	Cheryl Urszeni	270762	
Darlene J. Roach	69044	Steven Alexander Urszeni	270760	
Judith L. Rosen	270727	Steven Urszeni	270761	
Morton Rosen	270728	Harry Van Arsdale	270758	
Novimbrino Angela Rumbeau	270733	Patricia Lee Van Arsdale	270759	
Islene Runningdeer	189615	Kenneth Van Streader	270827	
Robert Salsgiver	270770	Patricia Ann Van Streader	270828	
Kathleen Salsgiver	270769	Johnny Waller	270790	
Jane Satchel	270698	Marcolina Waller	270821	
Virginia Schulman	80722	Dona G. Ward	199342	
Dennis Scott	189617	Jo Anne Warren	270822	
Jo Ann Scott	189983	Jo Ann Whyte	270823	
Judith Anne Scott	189616	Doreen E. Williams	24157	
Norman D. Scott	189982	Jeraldine Williams	297365	
Linda Mae Searcy	192360	Staria Wims	270824	
Jacqueline Shelton	218397	Bonnie Yappel	270831	
Dale Shockling	270767	Debbie L. Yates	25679	
Carolyn Shockling	270768	Nora Yisreal	270701	
Yvonne Simpson	106628	Janelle Yonley	270666	
Dora Ann Sipe	189993	Diane Pinard	7113	88-1766
Barbara Sizemore	173198	Dawn Gebo	7306	
Catherine Teresa Smith	270826	Sandra Cassier	7646	
Donald C. Smith	190106	Patrick Cassier	7647	
Elizabeth A. Smith	270766	Alexia Anderson	225182	88-3604

APPEAL NUMBER 88-3604 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Barbara Anderson	231938	Roger A. Franz	258177
Philip Anderson	268170	Julia Bloch Frey	163423
Paula C. Bannow	11228	Janette S. Gamet McMahon	11344
John Bannow	271718	George McMahon	272764
Diana R. Beard	10440	Mary C. Graham	15386
Robert Davis Beard	271192	Ronald Graham	274584
Sherry Bergman	15385	Xenia Graves	11341
Charles Bergman	271992	Cheryl A. Gruse	11334
Marsha Brown	71237	Roberta Guildner	10501
Jeannette Bulinski	15584	Ava Hamilton	11343
Gregg Gundersen	272541	Delmar Hamilton	262660
Wendy R. Busch	10864	Delores M. Haro	228508
Lillian Castillo	122920	Lori Haugland	206197
Elizabeth Chamberlayne	48517	Mary R. Hein	16655
Carol Cooke	10446	William Hein	272766
Donna Cornelisse	15383	Janet Heitzmann	10449
Denise Crowell	10865	Mary Frances Hilko	243918
Mike Crowell	271721	Lucy Judson	10444
Jacki Dasso	10454	Craig Alan Yeager	272765
John Thompson	271720	Betty Kenzel	10443
Sharon Ebert	223890	Richard E. Kenzel	263118
Dennis Ebert	271532	Judy Kurtz	10452
Laura B. Emerson *	16301	Judith Lavezzi	6088
Gary S. Emerson *	263135	Susanne Leuthauser	11337
Carol Evans	11339	Truman Leuthauser	262311
Dennis S. Evans	271538	Harriet Elizabeth Mann	223977
Melinda F. Evans	10448	Sharon L. Mazotti	223979
Hawley Roger Evans	272532	Daniel Mazotti	268168
Carla Magdanz Everett	15585	Sandra R. Merrill	10451
Barbara Ferguson	10862	Roy R. Merrill	262312
Charles Ferguson	262197	Laurel Ruth Mifflin	255908
Nancy C. Franz	15382	John Mifflin	273601

*Not a petitioner

APPEAL NUMBER 88-3604 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Nathan Mifflin	254594	Jo Susan Verspohl	13063
Sandra D. Miller	11342	Ronald Verspohl	272554
John K. Miller	268162	Carol J. Waltz	16299
Peggy Morgan	11336	Ronald F. Waltz	268165
Barbara R. Nowak	10445	Kathleen A. Watson	199542
Mary Ann Perkins	10447	Larry Watson	291814
Russell Perkins	263117	Abby Weinstein	166871
Ravonda L. Potter	10450	Barry Weinstein	258076
Roger Jay Potter	271533	Diane West	10408
Kathy Quinton	16300	Martha Whitehead	199551
Judith Anne Ramsay	10442	Marlyin Wilson	25436
Cbarles E. Ramsay	271723	Vicki Woodard	10441
Pamela S. Reiter	11340	Tom George	171536
Peter Reiter	274587	Deirdre J. Zietz	15384
Ella Ruth Rogers	9295	Leonard E. Zietz	260920
Elaine Rogers	16298	Rebecca L. Adair	239633
Donis Rogers	265558	Gary A. Adair	239634
Christine Seiffert	171920	Sharon C. Angel	145182
Stefanie Selden	9271	Gene R. Angel	304529
Judy Sheppard	25992	Katharine K. Beattie	106539
M. Lee Sheppard	268166	Fareda E. Belcher	239629
Jessica A. Simkulet	11335	Floyd Belcher	106540
Janet Singletary	16654	Linda M. Black	239635
Roger Singletary	268167	William R. Black	239636
Evelyn M. Snyder	16302	Mary A. Bonner	37245
Andrew Snyder	15387	Robert I. Bonner	239637
Marcia Steel	16303	Johnsie C. Brown	117778
Mary Stewart	15387	Joseph T. Brown, Jr.	326617
Charles D. Stewart	265520	Vicki L. Brown	106541
Karon Tiger	234904	Randy L. Brown	106542
Thelma L. Tilman	236252	Juanita L. Brown	106543
Durcille Trolinger	206281	Shirley Mae Burroughs	106550

APPEAL NUMBER 88-3604 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Robert Burroughs	106551	Kay Diane Milligan	6205
Beverley Davisson	106544	William D. Milligan	6206
William A. Davisson	106545	Betsy A. Munson	106577
Jason W. Davisson	106546	Judith A. Nichols	106561
Debra G. Dean	12776	James R. Nichols	106562
Mary Ann Evertson	106547	Kathleen K. Pope	106578
Robert W. Evertson	106548	Rita M. Raaf	106579
Sandra L. Flynn	106549	Richard D. Raaf	106580
Joyce Frieders	106569	Courtney L. Raaf	106581
Charles D. Frieders	106570	Elizabeth W. Rinehart	239641
Patricia Graber	269036	Richard R. Rinehart	239642
Patricia J. Heuseveldt	239639	Gaylene P. Schommer	106563
Ronald W. Heuseveldt	239640	John W. Schommer	106564
Heather Hull	106571	Rachel H. Scott	106565
Kenneth L. Hull	106572	David L. Scott	106566
Patty E. Hutton	106553	Janet L. Scott	106582
Leon D. Hutton	106554	Janice A. Sell	239643
Amy Marie Hutton	106552	Steven K. Sell	239644
Charlotte S. James	269035	Fay Annetta Smith	106583
Kay M. Kincade	243662	Rhonda J. Smith	212510
Paul W. Kincade	243663	Peggy A. Sneegas	239645
Bonlyn G. Qulick	251829	Roger A. Sneegas	239646
Anna Louise Luhman	106555	Rebecca J. Stafford	297307
Kersten Males	106575	Sonja G. Sweek	106584
William Males	106576	Nancy J. Taylor	106567
Roberta C. Martin	106573	Mary Ann Thomas	106585
Keith A. Martin	106574	Steven J. Thomas	106586
Sarah E. McLeod Kirk	106556	Elizabeth E. Tomaszewicz	239648
David C. McInnis	106557	George R. Tomaszewicz	239649
Billie Rae Mercer	106558	Patricia Ann Tronsgard	106568
Sandra J. Mertens	106559	Catherine L. Wood	239630
Ronald G. Mertens	106560	Joda D. Wright	239631

APPEAL NUMBER 88-1757 APPELLANT	DALKON SHIELD NUMBER	APPELLANT	DALKON SHIELD NUMBER
Georgia Sutton	85028		
Maurice Watson	285611		
Barbara L. Elliman	203473		

Note: This document continues at Page No. 134a.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLENDA BRELAND, SHERRY GASKINS, HELENE QUINN, MARIA MARTINEZ, CHERYL ZUNIGA, GAYLE AYON, JUDITH DEPTULA,	)	Plaintiffs,
AETNA CASUALTY & SURETY CO.,	)	Civil Action No. 86-0315-R Defendant.

ORDER CONDITIONALLY CERTIFYING CLASS

On consideration of Plaintiffs' motion for class certification, with hearing thereon having been held on October 30, 1986, the Court finds the requirements for class action certification under Federal Rules of Civil Procedure 23 has been conditionally satisfied.

Consistent with the Court's determination by Order of November 4, 1986, to lift the stay in this action to permit Plaintiffs to proceed with discovery against Defendant, Aetna Casualty and Surety Company, and to assure that the class will have the benefit of all such discovery, this Court deems it proper to conditionally certify this action as a class action at this time, subject to further consideration in light of discovery developments, whether this action should continue to be maintained as a class action, and if so, in what form.

Accordingly, IT IS ADJUDGED AND ORDERED that this action is conditionally certified as a class action subject to reconsideration after completion of discovery.

DATED:

/s/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY,	)	
INCORPORATED, Debtor.	)	Chapter 11
	)	Case No. 85-01307-R
	)	Judge Merhige
	)	(Retained Proceeding)
DALKON SHIELD CLAIMANTS'	)	
COMMITTEE in its own right and on	)	
behalf of A. H. Robins Company,	)	
Incorporated, Plaintiff,	)	Adversary Proceeding
	)	No. 87-1006-R
v.	)	
	)	
THE AETNA CASUALTY AND	)	
SURETY CO.,	)	
Defendant.	)	
GLENDA BRELAND, et al.,	)	
Plaintiffs,	)	Civil Action No.
	)	87-0315-R
v.	)	
	)	
AETNA CASUALTY AND	)	
SURETY COMPANY,	)	
Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that plaintiffs' motion for class certification is granted in the following respects:

The Court hereby certifies a mandatory class, whether the plaintiff is a member of Class A or Class B, with respect to any

claim that Robins and Aetna improperly settled, in 1984, litigation relating to the meaning and scope of Aetna's product liability insurance ("the coverage litigation"), and that such settlement and releases should be set aside.

The Court hereby certifies Class A, defined as "All those individuals who have complied, or are deemed to have complied by the demonstration of excusable neglect, with orders of the Federal District Court for the Eastern District of Virginia governing the filing of proofs of claim and questionnaires noting the use of the Dalkon Shield." Class A members shall be mandatory class members for all purposes.

The Court hereby certifies Class B, defined as "All other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so and are not deemed to have done so." Class B members shall be mandatory class members on all claims except claims for compensatory damages unrelated to the coverage litigation. On such compensatory damages claims, Class B members may opt out of this class action. Such opt out rights shall not expire before an individual manifests an injury if such individual has no actual notice of the right to opt out.

Let the Clerk send a copy of this Order to counsel of record in the *Breland* action and to the parties on the Court's service list.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date: April 12, 1988

OF JUDGMENT OR ORDER
On Docket April 12, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY, INCORPORATED, Debtor.	)	Chapter 11
	)	Case No. 85-01307-R
	)	Judge Merhige
	)	(Retained Proceeding)
DALKON SHIELD CLAIMANTS' COMMITTEE in its own right and on behalf of A. H. Robins Company, Incorporated, Plaintiff,	)	Adversary Proceeding No. 87-1006-R
v.	)	
THE AETNA CASUALTY AND SURETY CO., Defendant.	)	
GLENDA BRELAND, et al., Plaintiffs,	)	Civil Action No. 87-0315-R
v.	)	
AETNA CASUALTY AND SURETY COMPANY, Defendant.	)	

MEMORANDUM

This matter is before the Court on motions to certify a mandatory plaintiff class. The *Breland* action was brought against the Debtor's insurance carrier Aetna Casualty and Surety Co. ("Aetna") by claimants alleging injuries from the product and conduct of the Debtor and Aetna. The paramount issue is the propriety of certifying mandatory or opt-out classes with respect to compensatory and punitive damages.

Procedural Background

Commencing in the 1970's, A. H. Robins Company Incorporated (the "Debtor" or "Robins") manufactured an intrauterine contraceptive device known as the Dalkon Shield. Plaintiffs, in what has come to be known as the "*Breland*" action, are seven female Dalkon Shield claimants who allege injuries caused by the Dalkon Shield. *Breland* plaintiffs sue in their individual capacity and as representatives[1] of all other persons who claim damages, injuries, or potential injuries arising from the use of the Dalkon Shield.

Plaintiffs seek compensatory and punitive damages against the Debtor's insurer on theories of negligence, strict product liability, conspiracy, RICO, and an "insurance conspiracy" relating to the conduct of Aetna in connection with its providing products liability insurance to Robins. In addition, the complaint alleges, on behalf of the class, that Robins and Aetna improperly settled litigation instituted by Robins relating to the meaning and scope of Aetna's product liability insurance ("the coverage litigation"), and that the settlement and releases between Aetna and Robins in 1984 in the coverage litigation should be set aside.

Subsequent to institution of the *Breland* action, the Official Dalkon Shield Claimants Committee (the "Committee") filed, by leave of court, on August 19, 1987, an adversary proceeding in its own right and on behalf of A. H. Robins Company, Inc.

This complaint seeks judgment against Aetna for (a) contribution for all or part of any damages paid to Dalkon Shield claimants by Robins, in an amount to be determined at trial, with interest

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[1]By Order dated December 29, 1986, entered in *Breland v. Aetna Casualty & Surety Co.*, CA No. 86-0315-R, the Court conditionally certified a class "subject to further consideration . . . [as to] whether this action should continue to be maintained as a class action, and if so, in what form."

thereon, as well as defense costs, including legal fees and administrative expenses; (b) for contribution for all or part of any future damages to be paid to Dalkon Shield claimants by Robins, in an amount to be determined at trial, with interest thereon, as well as defense costs, including legal fees and administrative expenses; and (c) for such other and further relief as the Court deemed just and proper.

Aetna in turn, though denying any liability, filed a counterclaim against Robins. Aetna alleges that, in the event that Aetna is liable to Robins for contribution or for other form of relief, then, as to any amounts which Aetna is required to pay to Dalkon Shield claimants (other than under the policies of insurance issued by Aetna to Robins) on account of injuries related to the Dalkon Shield, Robins is liable to Aetna for contribution as to all such payments.

On September 4, 1987, the Committee's adversary proceeding was stayed, and on October 15, 1987 that proceeding and the *Breland* action were consolidated pursuant to Fed.R.Civ.P. 42(A) and Bankruptcy Rule 7042.[2]

The obvious goal of the Committee in bringing the adversary proceeding was the enhancement of any Dalkon Shield fund which might be available for the benefit of its constituency. Its claim, as a practical matter, is duplicative of the *Breland* action in its objective and in the issues raised. On October 20, 1986, the Committee unsuccessfully sought leave to intervene as plaintiffs in the *Breland* action and in support of its motion contended, as the Court now agrees, that:

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[2]It is to be noted that Bankruptcy Rule 7023 provides that Fed.R.Civ.P. 23 applies in adversary proceedings while Bankruptcy Rule 9014 allows the application of Rule 7023 to "any stage" in contested matters. *See In re American Reserve Corp.*, 56 U.S.L.W. 2497 (7th Cir. February 18, 1988).

The claims asserted against Aetna in the Breland Action seek to compensate Dalkon Shield Claimants for alleged damages caused directly or indirectly by the Dalkon Shield. Such claims arise from Robins' manufacture, sale and distribution of the Dalkon Shield and from the handling of claims asserted against Robins arising out of same. Such claims against Aetna are derivative of and factually intertwined with the allegations, theories of liability and claims which have previously been asserted against Robins and E. Claiborne Robins, Sr., Hugh J. Davis and E. Claiborne Robins, Jr., each of whom is named as a co-conspirator in the Breland Action.

As a practical matter, to the extent the Breland Action is permitted to proceed against Aetna, Robins will be required to participate in any discovery conducted therein and in any trial thereof because much of the evidence and documentation relevant to the claims asserted therein is in Robins' possession. Testimony of Robins' officers, directors, employees, agents and attorneys , would be required by continued prosecution of the Breland Action.

The claims asserted against Aetna in the Breland action also implicate certain liability insurance policies issued by Aetna to Robins (the "Aetna Policies"). The continued prosecution of the Breland Action would therefore potentially affect assets of Robins' estate and would require Robins' participation to protect the estate's interests against adverse findings with respect to the Aetna Policies.

The Court in its stay order of September 4, *supra*, had directed that the "stay be clarified so as not to prohibit discussions on all relevant issues in these consolidated cases." On

February 4, 1988, the Court, to permit negotiations in this litigation to proceed parallel to and in conjunction with the negotiations for a consensual plan of reorganization, lifted the stay previously imposed in the *Breland* matter.

The record reflects that a number of parties sought leave to intervene in the *Breland* action, most for purposes of opposing a class certification. The Court granted intervention for that limited purpose.

History of the Bankruptcy Reorganization Case

The history of this massive bankruptcy case has been generally set out by the United States Court of Appeals for the Fourth Circuit in at least ten opinions deciding twenty appeals.[3] Nevertheless, a summary of the background of the case may be of assistance in considering the Court's ultimate conclusion on the instant issue.

Aetna was the Debtor's product liability insurer with an obligation to defend Robins against Dalkon Shield claims manifesting during the period of the coverage, 1970-1978.[4]

The Dalkon Shield had been distributed not only in the United States, but in approximately 100 foreign countries. Within a few

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[3]*Maressa v. A. H. Robins Co.*, 839 F.2d 220 (4th Cir. 1988); *Grady v. A. H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988); *Official Committee of Equity Security Holders v. Mabey, Examiner*, 832 F.2d 299 (4th Cir. 1987); *cert. denied*, 56 U.S.L.W. 3640 (March 22, 1988); *Beard v. A. H. Robins Co.*, 828 F.2d 1029 (4th Cir. 1987); *Committee of Dalkon Shield Claimants v. A. H. Robins Co.*, 828 F.2d 239 (4th Cir. 1987); *Oberg v. Aetna Casualty & Surety Co.*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3643 (March 22, 1988), *Van Arsdale v. Clemo*, 825 F.2d 794 (4th Cir. 1987); *Vancouver Women's Health Collective Society v. A. H. Robins Co.*, 820 F.2d 1359 (4th Cir. 1987); *In re: Diana R. Beard*, 811 F.2d 818 (4th Cir. 1987); *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 251 (1987).

[4]Robins discontinued the manufacture and sale of the Dalkon Shield in 1974.

years after its initial distribution of Dalkon Shields, the Debtor was faced with a large number of personal injury claims. By the time it sought protection under Chapter 11, over 15,000 claims had been made and over 6,000 lawsuits in federal and state courts were still pending. Lawsuits had been instituted in literally every state of the country. Several large judgments for punitive damages had been awarded against Robins, and, at least one, at the time of the institution of the Chapter 11 case, was unsatisfied and on appeal. By the middle of August, 1985, the Debtor and its insurance carrier had expended more than $500,000,000.00 in defense, satisfaction and settlement of thousands of claims.

In August 1985, with its insurance claims nearly exhausted and the expenses of litigation continuing to increase, Robins filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in this Court. The petition sought both time for Robins to reorganize its affairs in the face of massive, complex litigation, and to seek a means for providing full compensation, if possible, to those who could demonstrate injury from the use of its product.

The Court, in a procedure approved by its Court of Appeals,[5] directed Robins to give world-wide notice of its bankruptcy proceedings and to encourage potential claimants, both present and future, to file claims by mailing a written document containing their names and addresses. As a consequence over 300,000 persons filed the required document.

These filings initiated a massive task, joined in by the official committees appointed by the Court, of establishing procedures for determining which claims would be eligible for consideration of compensatory payments under the Debtor's anticipated Plan

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[5]*See Vancouver Women's Health Collective Society v. A. H. Robins Co.*, 820 F.2d 1359 (4th Cir. 1987).

of Reorganization. The result of the implemented procedures established that there were approximately 200,000 claims to be considered in the contemplated reorganization.

Aetna asserts that it had been named in approximately 140 complaints throughout the United States alleging facts and theories substantially similar to those alleged in the *Breland* action. Prior to the stay of proceedings occasioned by the filing of the petition for reorganization and a subsequent preliminary injunction entered by this Court staying continuation of "related" claims, approximately 40 cases against Aetna had been dismissed. In every case in which the dismissal was involuntary, a ruling was obtained by Aetna that the complaint failed to state a claim against Aetna.[6]

In the course of the reorganization proceedings, numerous claimants sought to hold Aetna jointly liable with Robins (and sought as well, to hold other persons or entities jointly liable with Robins) for Dalkon Shield injuries. The Court preliminarily enjoined the continued prosecution of such actions for, among other reasons, the adverse effect it would have upon Robins and its continuing effort to reorganize. The preliminary injunction was upheld in *A. H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 251 (1987) and *Oberg v. Aetna Casualty & Surety Co.*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3643 (March 22, 1988). As to the suits against Aetna, for example, it was recognized that Aetna's defense would be premised, in part, upon the conduct of Robins and that Robins, even if not named as a party, inevitably would be drawn into any such litigation, both during discovery and at trial. The Fourth Circuit acknowledged that litigation against Aetna, even where the insurance proceeds which constitutes the property of Robins was not involved and Robins was

[6]*See* Affidavit of John G. Harkins, Jr. (attached hereto as Appendix A).

not named, nevertheless would inevitably interfere with the reorganization effort of Robins. *Oberg*, 828 F.2d at 1026.

In addition to the threat posed to Robins by litigation against Aetna, Aetna is intertwined in the Robins reorganization proceeding in two other significant ways. First, Aetna filed a substantial proof of claim relating to issues involving the amount and availability of remaining insurance coverage, an important asset of the estate. And second, as the Court has heretofore made reference, the Committee sought contribution from Aetna on account of payments made or to be made by Robins to Dalkon Shield claimants. Aetna, in a counterclaim, understandably contended that the Debtor would, under such a theory, be liable to it for payments by Aetna to Dalkon Shield claimants.

The Court has consistently sought a consensual plan of reorganization. In December, 1987, after a number of days of ora tenus proceedings involving experts for each of the official committees, Aetna and the Debtor, the Court determined that any such plan must provide, in the Court's estimation, for payment of Dalkon Shield claims and related expenses the sum of $2,475 billion over a reasonable period of time.

The Official Committees and the Debtor have now agreed upon a plan of reorganization which attains that goal. This plan will shortly be presented to all claimants for their approval or rejection.

The reorganization plan is dependent upon a merger by the Debtor with a subsidiary to be created by American Home Products Corporation ("American Home Products"). The funding of a Claimant's Trust would be provided by American Home Products, with contributions by individual members of the Robins family and participation by Aetna as a settler in the *Breland* case. While the amount to be contributed by Aetna may or may not be sufficient for court approval, as any class settlement must be separately approved after a hearing, Aetna's participation is

unquestionably an integral aspect of the Debtor's Plan of Reorganization.

Discussion

Plaintiffs sought and still seek certification of two classes of persons:

> Class A being all those individuals who have complied with orders of the Federal District Court for the Eastern District of Virginia governing the filing of proofs of claim and questionnaires noting injuries or potential injuries from the use of the Dalkon Shield.
>
> Class B being all other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so.

For reasons of its own interest in achieving an efficient resolution of all claims by Dalkon Shield users against it in one proceeding, and because of its professed concern for the public interest in avoiding lengthy and costly litigation throughout the country as had characterized the pre-petition Dalkon Shield litigation against Robins, Aetna supports the class action.

Accordingly, Aetna stipulated that, if the action were certified as a class action, Aetna would agree to having non-common issues of individual medical causation and individual amount of damages decided in the claims resolution process found by the Court to be appropriate for liquidating and paying the claims of the Dalkon Shield claimants.

In December, 1986, after briefing and argument on behalf of all parties who wished to be heard, this Court, principally for purposes of expediting pre-trial discovery, entered an order provisionally certifying the *Breland* action as a class action, subject to further determination by the Court as to the appropriate pro-

vision or provisions of Fed.R.Civ.P. 23 under which certification would be proper, if at all.

The movants of the instant motion seek a certification under Fed.R.Civ.P. 23(b)(1) for settlement purposes with no opt-out privileges, or in the alternative, a certification of such class with opt-out rights for Class B members' compensatory damage claims only. The settlement aspect is material in considering appropriate, if any, certifications under Rule 23, because the requirements of Rule 23 may be more easily satisfied in the settlement context than in the more complex litigation context. Since the proposed *Breland* settlement is so intertwined with the Debtor's proposed Plan of Reorganization which is being recommended to the Dalkon Shield claimants by each of the Official Committees, and since the Court's initial reaction is affirmative, the proposed settlement is preliminarily deemed to be fair and reasonable at least for purposes of class notice thereof.

The primary issue which the Court must ultimately determine in a settlement context is whether the class's claims were fairly and vigorously advocated in non-collusive negotiations reaching a fair and reasonable settlement. *See generally* 2 H. Newberg, *Newberg on Class Actions* § 11.27A (2d ed. Supp. 1987).

Prerequisites of Rule 23(a).

The Court is, as evidenced by its December 1986 conditional certification, satisfied that all requirements of Fed.R.Civ.P. 23 (a) have been satisfied. Rule 23 (a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative par-

ties will fairly and adequately protect the interests of the class.

First, joinder of all potential members of the class is impractical. Potentially, every Dalkon Shield user who suffered or may suffer an injury from its use are appropriate members. A conservative number would be in excess of 325,000 individuals. Indeed, in addition to the more than 300,000 individuals who filed an initial notice of their claim, a large number of individuals may qualify as members although they did not initially file a notice of claims in the Chapter 11 proceedings. Consequently, each of the proposed *Breland* classes would render joinder of either class impracticable.

Second, common questions of law or fact exist among the named plaintiffs and members of the class.

Third, the claims of the individual *Breland* plaintiffs are typical of the class members claims. Indeed, Aetna's alleged liability to class members must be premised on facts arising out of its relationship with the Debtor. There are no allegations of direct contact by Aetna with the plaintiffs and there have been no suggestions that Aetna had any relationship with the alleged injuring device except as an insurer.

Furthermore, Aetna's stipulation that non-common issues of individual medical causation and individual amount of damages would be decided in the claims resolution process eliminates, as a practical matter, uncommon or atypical individual issues. Indeed, this stipulation eliminates obstacles frequently present in tort actions where plaintiffs seek to certify a class.

This stipulation would enhance the manageability of the litigation even if the settlement were rejected. Simply stated, Aetna's liability, at any point of time covered by the *Breland* complaint, would not be resolved on a plaintiff-by-plaintiff basis. Not unlike *In re "Agent Orange" Product Liability Litigation*, 100

F.R.D. 718, (E.D.N.Y. 1983), *mandamus denied-sub nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir., *cert. denied*, 465 U.S. 1067 (1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), Aetna's liability is an all-or-nothing proposition. In *Agent Orange*, the Court certified a class partially on the ground that the "defendants contest liability not just as to individual members of the class, but as to any members of the class." 100 F.R.D. at 723. Similarly here, each of the theories asserted in the complaint gives rise to a common question of law.

Fourth, the Court has previously held that the plaintiffs would provide fair and adequate representation. Accordingly, the Court finds that the prerequisites of Rule 23(a) are satisfied.

The Coverage Litigation

The *Breland* plaintiffs have, in Count IX of their Third Amended Complaint, challenged the validity of an agreement entered into by Robins and Aetna in 1984 for purposes of settling the issue of Aetna's liability, as insurer, for punitive damage verdicts or awards entered against the Debtor.

Individual actions relating to what rights and liabilities arise in favor of plaintiffs regarding the settlement of the coverage litigation necessarily encompass an interpretation of the contracts between Aetna and Robins, as embodied in the written insurance policies issued by Aetna, and involve defining the relationship, duties and obligations which Aetna, or any insurer, would owe to its insured and the public at large arising from the provision of products liability insurance coverage. As a consequence, there is a danger that in individual adjudications (entailing as it might thousands of cases) inconsistent or varying adjudications concerning Aetna's obligations and liabilities as an insurer.

The products liability policies of Robins constitute valuable property of Robins' estate. The settlement of the coverage litigation increased the amount of insurance available to Robins

from the amount Aetna had contended was available in the coverage litigation. The amount of unused insurance which now remains available to Robins to satisfy the Dalkon Shield claims was the subject of a report by this Court's appointed examiner, who relied upon, in part, the settlement agreement in the coverage litigation as a point of departure for his analysis.

Based on the Examiner's review of the releases obtained in the coverage litigation settlement and the adequacy of that settlement, Robins and Aetna have agreed to resolve the action for contribution against Aetna on behalf of Robins, Aetna's alternative counterclaim for contribution against Robins, and Aetna's substantial proof of claim against the remaining insurance (subject to Court approval). This proposed settlement of all such issues, as reflected in the Plan, has facilitated the formation and prospective confirmation of the Plan.

In addition, multiple adjudications of the *Breland* action's challenge to the validity of the settlement of the coverage litigation pose the risks inherent to multi-party disputes over a limited fund. Such a claim must be litigated in a single forum because, if successful, individual plaintiffs' challenges would reopen the coverage dispute so as to risk a decrease in the insurance available to compensate Dalkon Shield victims. Accordingly, certification of a mandatory class with respect to the coverage litigation under Rules 23(b)(1)(A) and (B) and 23 (c)(4) (certification with respect to a particular issue) is appropriate.

Breland Settlement and Proposed Plan of Reorganization

Following protracted negotiations between the parties, and after what has been represented to the Court as extensive discovery between Aetna and the Class plaintiffs, a settlement, subject to the Court's approval, was reached. The Court, whose Examiner was present during many of the negotiation

sessions concerning not only the *Breland* claim, but also the Debtor's Plan of Reorganization, was cognizant of the efforts and indeed was called upon from time to time to endeavor to assist in what were long and tedious sessions held in an effort to reach a consensual Plan of Reorganization.

By its terms, the Settlement Agreement requires substantial consideration to be provided by Aetna for the benefit of the members of the Class, in terms of a cash payment and various insurance policies to be made available. The predominant portion of Aetna's contribution under the Settlement Agreement will become an indispensable part of and will be distributed directly through the Dalkon Shield Claimants Trust established pursuant to the present Robins' Plan (if the *Breland* settlement is ultimately found fair, reasonable and adequate by this Court and approved pursuant to Fed.R.Civ.P. 23(e), and upheld on appeal.)

More specifically, the settlement in this action has been structured to provide benefits to both *Breland* classes, those in Class A and those in Class B. In the case of Class A, Aetna has agreed to provide certain funds in the net amount of $75 million to be added directly to the Claimants Trust. In addition, Aetna would furnish the Claimants Trust with a policy of insurance in the amount of $250 million, which is excess funding for the Claimants Trust. That is, this excess policy would provide further funds to the Claimants Trust in the event that the Claimants Trust is required to expend all of the money deposited in it plus the investment income on those funds.

In the case of Class B, Aetna has agreed to provide two policies of insurance (the "Outlier policies") totalling $100 million. Class B consists of individuals not eligible to claim against the Claimants Trust for failure to comply with the procedures of the bankruptcy case. By agreement, these claims will be processed through the Claims Resolution Facility which

is being established by the Claimants Trust. A more complete description of Aetna's obligations and rights under the settlement is set forth in the Settlement Agreement and in the Plan.

The Settlement Agreement is also structured to avoid the further expenses of burdensome litigation, and to facilitate the overall resolution of claims concerning the Dalkon Shield by channelling claims into a unified claims resolution process and by providing additional funding for the purpose of effectuating this mechanism.

The proposed Settlement Agreement constitutes a "Qualified *Breland* Settlement" under the Plan, as that term is defined in Section 6.06 thereof. The approval of a "Qualified *Breland* Settlement" by this Court is the only non-waivable condition of the American Home Products-Robins Merger Agreement. Pursuant to the terms of Section 6.06 of the Plan, upon "payment in full," that is, payment of the amount agreed to or awarded, from the Claimants Trust, claimants may not commence or continue litigation against Aetna relating to the Dalkon Shield.

By this settlement, substantial additional consideration flows into the Claimants Trust for the benefit of the claimants who are eligible to apply for distribution from that Trust through the Claims Resolution Facility established by the Debtor's Plan. Such additional funds increase the likelihood of the adequacy of the Trust over time, if amounts are needed above the Court's estimation, and protect Robins, American Home Products, and all potential claimants from the consequences, if any, of a shortfall. In addition, by providing substantial consideration in the form of two Outlier Policies to compensate those who are not eligible to apply for distribution in the bankruptcy case, the settlement would provide compensation for claimants whose injuries might not otherwise be redressed.

A single adjudication is required because all of the claims against Aetna, focus primarily on Aetna's conduct vis-a-vis its relationship with its insured. Multiple adjudications of the identical factual and legal issues thus implicated could yield incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others.

Indeed, an opt-out class of Dalkon Shield claimants permitting them to sue Aetna for both compensatory and punitive damages would effectively nullify the *Breland* class settlement under paragraph 6(a) of the Settlement Agreement, and render the debtor's Plan of Reorganization voidable. The American Home Products and A. H. Robins merger is dependent on settlement of *Breland* on a class basis which, in turn, is dependent on Aetna's ability to be relieved of the danger of masses of individual suits stemming from their association with the Debtor.

The effect of permitting Class A members to opt out, thus triggering such contingencies as are contained in the *Breland* settlement and the American Home Products-Robins Merger Agreement, coupled with the loss of Aetna's contribution to the Plan of Reorganization, would be entirely inconsistent with the Bankruptcy Code, *see, e.g.*, 11 U.S.C. § 1129(a), as well as with accepted class action jurisprudence. *See Kincaid v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981).

The Class members will be adequately protected under Rule 23(e). They are entitled to and will receive an opportunity to be heard on the adequacy and fairness of the settlement.

The Court will not approve any opt-out provision with respect to Class A members. These members qualify to recover all compensation for all Dalkon Shield claims from the Claimants' Trust through the facility established by the Plan. In addition, the plan provides that the Trust will be establish-

ed and sufficiently funded by contributions by American Home Products and part of the proceeds of the proposed Aetna class settlement in an amount which satisfies the Court will be sufficient to compensate present and future Dalkon Shield claimants. Under these circumstances, opt-out rights for Class A members, (apart from creating the likelihood of inconsistent verdicts against Aetna) would severely impede the interests of other class members as a practical matter.

As heretofore noted, the Merger and the Plan are conditioned on an approval of the *Breland* settlement for multiple practical reasons. Further, the Fourth Circuit has determined that claims against Aetna are so closely related to claims against Robins, that claims against Aetna, "[i]nevitably, Aetna must involve Robins," and "Robins will inexorably be drawn into [such] litigation." *Oberg v. Aetna Casualty & Surety Co.*, 828 F.2d at 1026. "Because this involvement will put a substantial burden on Robins, it will detract from the reorganization process." *Id.* Under these circumstances, the objectives of the Plan to fully compensate tort claimants and to end Robins' involvement in all Dalkon Shield litigation through the creation of a fully-funded Claimants' Trust and through merger with a subsidiary of American Home Products will be frustrated if Class A members are permitted to opt out to sue Aetna for compensatory damages.

Moreover, permitting Class A members to opt out and to sue Aetna for compensatory damages, is to, as one counsel in argument opposing a mandatory class envisioned, encourage claimants to join the Trust as co-defendant in a jury trial after they have complied with the provisions of the Claims Resolution Facility for resolving their claim. Under those circumstances, the number of issues raised in such suits, and the cost of defending them will be greatly expanded, all of which will inure to the detriment of other claimants.

The Court's conclusion as to the sums needed to satisfy the Dalkon Shield Claimants did not encompass the added expense which inevitably flows from a multi-party suit.

The *Breland* Settlement, by negotiation between Aetna and the class, provides for the possibility of an opt-out for Class B members as to compensatory damages only. The Court will preserve this. While Fed.R.Civ.P. 23 does not provide for opt-out rights in class suits certified under 23(b)(1) or (2), "[p]arties to a proposed class action settlement may themselves provide for an opt out procedure by which class members may exclude themselves from the class and litigate their claims in the same action or in a separate lawsuit." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1154 (11th Cir. 1983).

Definition of the Classes

Plaintiffs' proposed class definitions are intended to dovetail the bankruptcy reorganization in the following respect. Class A, consisting of claimants who have properly followed the Court-ordered procedures of the bankruptcy reorganization, would be able to participate fully in the claimants' trust. Class B, consisting of claimants who have failed to comply with such procedures, would participate in the claimant's trust, under the proposed Plan of Reorganization, only on a subordinated basis. That is, if and when there are funds remaining after timely claims are paid, untimely compensatory damage claims will be paid.

Some claimants, however, who have failed to comply with the procedures of the bankruptcy case, have or will be able to demonstrate excusable neglect for such failure pursuant to Bankruptcy Rule 9006. These claimants will be deemed to have properly complied with the procedures and thereby participate in the claimants' trust on an unsubordinated basis. As a result,

the class definitions shall be clarified to include the "excusable neglect" claimants within Class A.

Accordingly, Class A shall be defined as "All those individuals who have complied, or are deemed to have complied by the demonstration of excusable neglect, with the orders of the Federal District Court for the Eastern District of Virginia governing the filing of proofs of claim and questionnaires noting the use of the Dalkon Shield." Class B shall be defined as "All other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so and are not deemed to have done so."

Conclusion

In light of the fact that each of the requirements mandated by Rule 23 as to certifications of a class are present in this cause and specifically those contained in Rule 23(b)(1), the Court will certify both Class A and Class B under Rule 23(b)(1) reserving to Class B members the right to opt out as to compensatory damages only. Class A members, Dalkon Shield claimants who are found to be eligible under the Plan of Reorganization, shall be deemed to be mandatory class members for all purposes.

The Court is satisfied that the foregoing is required under the law and the facts of this case.

All Dalkon Shield claimants who may have a claim for punitive damages against Aetna are before the Court both in the Plan of Reorganization and one of its integral parts, the *Breland* Class action and its Settlement Agreement. It is entirely appropriate that the Plan of Reorganization, if approved, will provide full compensation to all members of Class A, including punitive damages. Class B members, who have only subor-

dinated claims against the Trust, will be eligible for compensation from the policies supplied by Aetna as part of its Settlement Agreement.

The Debtor, in this manner, will be free of all litigation concerns and may, after confirmation and consummation, engage in a successful reorganization. A single, aggregate amount of punitive damages, as called for in the proposed Plan, will be required to facilitate a successful reorganization.

An appropriate Order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Dated: April 12, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY,	)	Chapter 11
INCORPORATED,	)	Case No. 85-01307-R
Debtor.	)	Judge Merhige
	)	(Retained Proceeding)
GLENDA BRELAND, et al .,	)	
Plaintiffs,	)	CIVIL ACTION
	)	No. 87-1005-R
v.	)	
	)	
THE AETNA CASUALTY AND	)	
SURETY CO.,	)	
Defendant.	)	

AFFIDAVIT OF JOHN G. HARKINS, JR.

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADEPHIA :

John G. Harkins, Jr., being duly sworn according to law, deposes and says:

1. He is a member in good standing of the Bar of the Supreme Court of the Commonwealth of Pennsylvania, the Supreme Court of the United States, and of various other federal courts, including the Bar for the Court of Appeals for the Fourth Circuit. He has also been admitted *pro hac vice* to represent the interests of Aetna Casualty and Surety Company in various matters relating to A. H. Robins Company, Inc. or the Dalkon Shield in the United States District Court for the Eastern District of Virginia, including this action.

2. He and his law firm, Pepper, Hamilton & Scheetz, were retained by Aetna Casualty and Surety Company in 1984 to ad-

vise Aetna in connection with matters arising out of Aetna's relationship with Robins, as its insurer.

3. Commencing in early 1985, various Dalkon Shield claimants began filing actions naming Aetna as an additional defendant in Dalkon Shield litigation under theories of liability very similar to those which appear in the Third Amended Complaint in the above-captioned action (except for Count IX). Deponent was in charge of Aetna's defense in all such actions. Before Robins filed its Petition for Reorganization on August 21, 1985, approximately 140 such actions had been instituted in a number of state and federal courts throughout the country. In every such case in which it was timely to do so (before all such cases were stayed), Aetna filed a motion to dismiss, either under Rule 12 of the Federal Rules of Civil Procedure or under an equivalent state rule. In 36 of these cases, a ruling was issued by the presiding judge on Aetna's motion before the stay became effective and in every such instance, the presiding judge granted Aetna's motion and dismissed the action accordingly. In four additional cases, plaintiffs withdrew their claims against Aetna before a ruling and various additional cases were voluntarily dismissed in light of their stay of proceedings.

/s/ John G. Harkins, Jr.
JOHN G. HARKINS, JR.

Sworn to and subscribed before me

this 4th day of April, 1987

/s/ Clare A. Reilly
NOTARY PUBLIC

CLARE A. REILLY
Notary Public, Phila., Phila. Co.
My Commission expires July 3, 1989

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY,	)	
INCORPORATED, Debtor.	)	Chapter 11
	)	Case No. 85-01307-R
	)	Judge Merhige
	)	(Retained Proceeding)
DALKON SHIELD CLAIMANTS'	)	
COMMITTEE in its own right and on	)	
behalf of A. H. Robins Company,	)	
Incorporated, Plaintiff,	)	Adversary Proceeding
	)	No. 87-1006-R
v.	)	
	)	
THE AETNA CASUALTY AND	)	
SURETY CO.,	)	
Defendant.	)	
GLENDA BRELAND, et al.,	)	
Plaintiffs,	)	Civil Action No.
	)	87-0315-R
v.	)	
	)	
AETNA CASUALTY AND	)	
SURETY COMPANY,	)	
Defendant.	)	

MEMORANDUM

This matter came on for a hearing on the reasonableness, adequacy and fairness of the proposed settlement in this cause. At that evidentiary hearing, counsel for the *Breland* class and defendant The Aetna Casualty and Surety Company ("Aetna") appeared and proffered evidence in support of the proposed settlement. Three attorneys for class members were heard, and had the opportunity to present evidence, in opposition to the settlement.

Background

In mid-1970, A. H. Robins Company, Incorporated ("Robins") acquired all patent and marketing rights to an intrauterine contraceptive device known as the Dalkon Shield. Even before it ceased manufacturing the device in 1974, Robins received claims for personal injuries allegedly caused by the Dalkon Shield, and the number of claims accelerated substantially until August 1985, when approximately 15,000 claims had been made and more than 6,000 claims were still pending. By August 1985, when Robins filed a petition for reorganization under Chapter 11 of the Bankruptcy Code 11 U.S.C. § 101, *et seq.*, Robins and Aetna, as its insurer, had expended more than $500 million in the defense and satisfaction of such claims.

Aetna had been Robins' insurer for a number of years prior to 1970. Its policies covered the Dalkon Shield until the expiration of the final policy at the end of February 1978.

In 1985 a number of plaintiffs began suing Aetna in its own right, as opposed to merely naming Aetna because of the policy coverage. Prior to Robins' filing its petition, Aetna had been named in approximately 140 lawsuits. By the time of the bankruptcy filing, Aetna obtained a dismissal in approximately 40 of those cases. No plaintiff successfully litigated to its conclusion a case against Aetna in its own right for Dalkon Shield injuries.

Shortly after the filing of Robins' petition, this Court issued a preliminary injunction barring continued prosecution of suits against Aetna and other third parties for Dalkon Shield injuries. The preliminary injunction was twice reviewed and twice affirmed by the Fourth Circuit. *See Oberg v. Aetna Casualty & Surety Co.*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1246 (1988); *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 107 S.Ct. 251 (1986). The Fourth

Circuit held, as did this Court, that such litigation would inevitably involve Robins and thereby detract from the reorganization process. *Oberg*, 828 F.2d at 1026. Expeditious reorganization, of course, was necessary to pay claimants as promptly as possible.

On April 9, 1986, the *Breland* complaint was filed in the United States District Court for the District of Minnesota. The Minnesota Court *sua sponte* transferred the case on April 28, 1986 to the Eastern District of Virginia where it was refiled on May 15, 1986. Aetna played no role in the transfer.

The *Breland* plaintiffs are seven female Dalkon Shield claimants who allege injuries caused by the Dalkon Shield. The complaint sought certification of a broad class of Dalkon Shield claimants. Plaintiffs sought relief on theories of negligence, strict product liability, conspiracy, RICO and insurance conspiracy in connection with Aetna's conduct in providing product liability insurance for Robins. In addition, the complaint alleged that Robins and Aetna improperly settled litigation instituted by Robins relating to the meaning and scope of Aetna's policy coverage (the "coverage litigation") and that the *Breland* class was a third party beneficiary to such settlement.

Aetna answered the complaint denying all liability and raising several affirmative defenses. While Aetna sought to enforce the stay in other Dalkon Shield actions, it did not do so here. Counsel for Aetna represented to the Court that Aetna supported class certification as the most cost efficient procedure for resolving the question of Aetna's liability.

On July 23, 1986, the Court held a pretrial conference. The Court directed the parties to brief the class certification issues, but to engage in no other pretrial activity, such as discovery, so as to avoid any interference with Robins' reorganization efforts.

In briefing the class certification issue, Aetna stipulated that, if the action were certified as a class action and if the claims resolution in *Breland* could be coordinated with the claims resolution process in the Robins reorganization, Aetna would not separately litigate the non-common issues of individual medical causation and individual amount of damages. It would agree that all such issues would be resolved, if reached, in the claims resolution process.

On November 4, 1986, the Court lifted the stay for purposes of allowing the parties to engage in discovery. After conducting a hearing, the Court provisionally certified a class on December 29, 1986.

It should be noted that, prior to the provisional certification, a number of claimants' counsel appeared at one or more hearings and generally expressed the view that their opposition was not primarily to a class certification, but to a mandatory certification.

In February 1987, American Home Products Corporation ("AHP") offered to acquire Robins, allocating to the Dalkon Shield claimants the sum of $1.75 billion, which sum the Dalkon Shield Claimants' Committee agreed was satisfactory. Later that month, AHP withdrew its offer. Shortly thereafter, counsel for Aetna contacted counsel for AHP. AHP counsel communicated a concern over how to insure "global peace" if an acquisition were to proceed. That is, AHP questioned the wisdom of such a substantial investment where Dalkon Shield litigation against third parties, disruptive to the reorganizing or reorganized entity, could continue well beyond consummation of the merger—a position which was clearly expressed at the Court's fairness hearing.

In April 1987, Robins filed its first proposed plan of reorganization. This stand-alone plan provided for the even-

tual payment of $1.75 billion for Dalkon Shield claims through a letter of credit facility.

Prior to the filing of the first proposed plan, Robins, through the efforts of the Court's Examiner, Ralph Mabey, began negotiations with the Rorer Group, Inc. ("Rorer") concerning a possible merger of the two companies. After such negotiations became known to other parties, Rorer communicated to Aetna its interest in having Aetna aid the reorganization effort. Rorer expressed its concern that claimants might exist who would not be compensated in the reorganization and would continue disruptive litigation. That information was communicated to *Breland* class counsel.

In late April, 1987, the Court, at a hearing relating to the Robins reorganization, inquired whether Aetna could provide an insurance policy which would be "excess" of the claimants' trust under the plan. Indeed, the Court had for some time prior thereto, in open court, been suggesting that Aetna should consider a method of participating in some manner to assist the reorganization efforts. On June 4, 1987, Aetna submitted to the Court a proposal that Aetna issue an insurance policy to the claimants' trust to cover the claims of those "future" claimants who had filed notices with the Court in the reorganization. On June 30, 1987, Aetna and *Breland* counsel met and *Breland* counsel rejected Aetna's proposal. *Breland* counsel made a counter-proposal which Aetna rejected. During this period, the Court once more issued an informal stay of discovery.

At that meeting, the parties agreed that the amount of class counsel attorneys fees would not be discussed during settlement negotiations. That amount would not be determined until after the case was tried or settled.

On August 19, 1987, the Official Dalkon Shield Claimants Committee filed, by leave of the Court in the interest of

avoiding future issues of statutory limitations, an adversary proceeding in its own right and on behalf of Robins. This complaint sought judgment against Aetna for contribution. Aetna, in turn, though denying any liability, filed a counterclaim for contribution against Robins. On September 4, 1987, the Committee's adversary proceeding was stayed, and on October 15, 1987, that proceeding and the *Breland* action were consolidated pursuant to Fed.R.Civ.P. 42(a) and Bankruptcy Rule 7042.

On August 21, 1987, Robins filed a second proposed plan of reorganization which contemplated a merger with Rorer. The proposed plan provided for a payment of $1.75 billion for Dalkon Shield claims. While negotiations continued in *Breland*, no significant progress was made in the summer or early fall.

From November 5 through November 11, 1987, the Court heard evidence on the estimated total value of the Dalkon Shield claims. Before, during and immediately after the estimation hearing, substantial efforts, with the Court's encouragement, were made to develop a consensual plan of reorganization. The possible settlement of *Breland* was included in those discussions. Indeed, class counsel took the position that *Breland* could not be settled apart from a consensual plan.

On December 11, 1987, the Court announced its finding that the aggregate value of Dalkon Shield claims and related administrative expenses was $2.475 billion payable over a reasonable period of time. This announcement led to new proposals being submitted by Rorer, AHP, and Sanofi. During this time, counsel for Sanofi contacted *Breland* counsel regarding the possibility of coordinating a settlement of the class action with the reorganization. *Breland* counsel, however, found Sanofi's proposal with respect to the reorganization unacceptable and declined to negotiate until such proposal was changed.

On December 17, 1987, the Court informed the parties that if a new plan and settlement proposal were not soon filed, the Court would lift the stay in *Breland* and set a new trial date. On January 1, 1988, Robins announced that it had accepted Sanofi's bid. New proposals were submitted by all three companies. It soon became apparent that Robins was most likely to accept the AHP proposal. Intense negotiations ensued among counsel for Robins, the Official Dalkon Shield Claimants Committee, the *Breland* class, AHP, Aetna and other parties in interest. The Court's examiner was present as an observer. The goal was to reach an overall resolution of all controversies including Aetna's proof of claim filed in the reorganization, the *Breland* action, and the Claimants' Committee's adversary proceeding. AHP took the position that the successor corporation to Robins must be as free as possible from the burdens and distractions of continuing litigation arising out of the use of the Dalkon Shield, no matter who the defendant might be. At these negotiations, *Breland* counsel made a final proposal, acceptable to all other parties, to Aetna. Aetna accepted, subject to approval of the Court. Settlement of the *Breland* action was made a condition precedent to the Robins/AHP merger and, ultimately, consummation of the Robins/AHP plan of reorganization.

Settlement Proposal

The structure of the settlement dovetails the proposed plan of reorganization as reflected by the class certification definitions. By order dated April 12, 1988, the Court clarified the definition of the *Breland* classes. Class A is defined as follows:

> All those individuals who have complied, or are deemed to have complied by the demonstration of excusable neglect, with orders of the Federal District Court for the Eastern District of Virginia governing

> the filing of proofs of claim and questionnaires noting the use of the Dalkon Shield.

Class B is defined as follows:

> All other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so and are not deemed to have done so.

The proposed Robins/AHP plan of reorganization provides for the establishment of a Claimants' Trust. Class A members will be able to seek compensation from the trust. Class B members, however, may be procedurally barred from collecting against the trust. The proposed plan provides that some Class B members may collect against the trust only on a subordinated basis. Other Class B members will be completely ineligible.

The various components of the proposed *Breland* settlement would benefit both classes. If the settlement is approved, Aetna will make what is essentially a $75 million cash contribution to the Claimants' Trust. Specifically, it will pay $50 million directly into the Trust and $50 million to AHP, which will then pay $25 million into the Trust and return $25 million to Aetna as a partial premium on insurance. Furthermore, Aetna will provide three insurance policies totalling $350 million. One policy in the amount of $250 million is "excess" over the Claimants' Trust. That is, if and when the Trust is exhausted, Aetna will contribute up to $250 million to the Trust. The other two policies would respond to the claims of Class B members and have come to be known as the "outlier" policies. One $50 million policy would be available immediately and the other $50 million policy would be "excess" to the first. If unused for their primary purpose, the Trust excess and the outlier policies cross over to become excess to each other.

The evidence is unrefuted that the policies in question are unique, both as to coverage and limits, and they could not be placed in the commercial insurance market. Consequently, their commercial value cannot be calculated.

In valuing the settlement from the perspective of the claimants, they will at least receive the $75 million cash contribution to the Trust and, in all probability, the $50 million from the first outlier policy available upon the consummation date. The remaining $300 million in excess policies insures against the inadequacy of the established funds. If it becomes necessary to utilize the excess policies, the settlement value increases as moneys are expended to claimants. Accordingly, the maximum value of the settlement is $425 million, the total of the cash and the policies.

Standard of Review

In reviewing the proposed settlement, the Court is guided by the teachings of *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), which describes the factors to consider. Overall, the Court must evaluate the strength of the class claim on the merits. The Court shall not, however, change the fairness hearing into a trial. *Id.* at 1172. In addition, the Court need not conclusively decide unsettled issues at law. *Id.* at 1172-73.

In making this evaluation, the Court should consider the extent of discovery that has taken place, the stage of the proceedings, the absence of collusion in the settlement, the experience of class counsel and the attitude of the members of the class, as expressed directly or by failure to object. *Id.* at 1173. Each factor will be considered in turn.

Extent of Discovery and Stage of Proceedings

The procedural history is unusual in this case in that discovery was interrupted by several stays in order to prevent unnecessary disruption of the reorganization effort. Nevertheless, a substantial amount of discovery was conducted.

Another unusual aspect of this case is the extent to which discovery was available to the plaintiffs' bar prior to the filing of this lawsuit. A Minnesota law firm made available to the plaintiffs' bar its collection of documents and depositions obtained in bringing nearly two hundred suits against Robins. *Breland* counsel studied these materials before instigating this lawsuit.

In addition, two special masters were appointed by the United States District Courts of Minnesota and Kansas to evaluate documents. Class counsel represented plaintiffs' interests in that discovery process and had access to the special masters' reports. Class counsel were also involved in 1982 in a protracted mail fraud criminal trial relating to the Dalkon Shield in which Aetna materials were explored.

Because of the suits filed against Aetna in the prepetition period, Aetna had directed all of its offices nationwide to collect and ship all Dalkon Shield or Robins related documents to a central depository in Hartford, Connecticut. Over one million documents and numerous transcripts of Aetna personnel taken in Robins cases were collected. Aetna provided class counsel access to this depository.

Commencing in February 1987 and continuing to April 1987, class counsel, working in three and four person teams, actively reviewed, analyzed and cataloged documents at the depository. The reviewers marked certain documents for copying and shipping to Minnesota and requested that others

be contemporaneously copied for immediate study. Aetna cooperated with their efforts.

Approximately 5,000 documents were reexamined at counsel's law offices. The most significant documents were culled and indexed.

After the documents were analyzed, class counsel prepared more than one hundred interrogatories and notified counsel for Aetna of their intention to depose several past and present Aetna employees. At that time, discovery was again stayed.

Class counsel testified that they would want to conduct more discovery before proceeding to trial. Efforts to reach fair and amicable settlements in lawsuits would constitute little saving in effort, expense and judicial expenditure of time if settlement awaited complete preparation for trial. Sufficient discovery to permit counsel and the parties to fairly evaluate the liability and financial aspects of a case are all that are either necessary or prudent. However, considering that Dalkon Shield litigation has been going on now for approximately fifteen years, class counsel already has had access to more information than counsel would in most cases. *Cf. In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 211 (5th Cir. 1981) (reasonable evaluation by counsel need not be based on formal discovery where information is otherwise available), *cert. denied*, 456 U.S. 998 (1982). Counsel's substantial knowledge regarding Aetna's conduct enabled them to make a reasonable assessment of the strength of their case.

The expense and time with which an individual plaintiff would be faced in prosecuting a similar case would be staggering. Class action appears a reasonable method to afford claimants their day in court. The fact that the matter is here in consideration of a settlement does not detract from that established fact.

Experience of Class Counsel

The *Breland* class is represented by a team of seven law firms with broad and diverse experience and background. All counsel are members in good standing of their respective bars and have never been subject to discipline.

Joseph S. Friedberg's practice has consisted of criminal and civil litigation. He has participated in several cases, as here, involving alleged conspiracy. As mentioned above, he was involved in a document investigation and criminal trial relating to the Dalkon Shield. He is an experienced attorney given the highest rating in Martindale-Hubbell, as are each of the major class counsel. While those counsel opposing the settlement, who to a great extent also hold high professional ratings, made much of the fact that Mr. Friedberg is not known as a personal injury lawyer per se, the Court finds that not to be a necessary qualification. Indeed, the essence of the class case is a far cry from a run-of-the-mill personal injury tort case.

Ronald I. Meshbesher is a senior partner in a product liability law firm. He has been president of the Minnesota Trial Lawyers Association. Like Mr. Friedberg, he was involved in Dalkon Shield litigation prior to the commencement of this suit.

John A. Cochrane has tried numerous personal injury suits. He has been lead counsel in several class actions. Douglas W. Thomson is an experienced trial lawyer in civil and criminal litigation. James Hovland is a civil litigator who specialized in Dalkon Shield cases for a number of years prior to the filing of this action. The Richmond firm of Bremner, Baber & Janus served as local counsel with Theodore Brenner ably coordinating the complex procedural aspects of this case. Herbert B. Newberg is a leading national authority on class action litigation.

The Court finds that class counsel are eminently qualified to represent the *Breland* class.

Absence of Collusion

The Court finds no evidence of collusion in negotiating the settlement. The settlement was the product of intense negotiations conducted in conjunction with negotiations regarding the Plan. It would be ludicrous to assert that collusion would have escaped the attention of the Court's Examiner, counsel for the Official Committee of Dalkon Shield claimants, and other parties representing diverse interests, all of whom are experienced and well seasoned veterans of litigation.

Counsel who oppose the settlement assert that the mere fact that this action, and no other, was allowed to go forward is indicative of collusion. They find it suspicious that *Breland* counsel chose to file a class action when they knew that other Dalkon Shield attorneys opposed the use of the class action device. These two assertions, however, cancel each other out. Aetna did not seek to enforce the stay because it believed the class action was the appropriate vehicle for resolving the question of its liability. *Breland* was the first such action filed.

Furthermore, some of the opposition attorneys appear to believe that they themselves have a right to litigate the issues and that that right somehow is being infringed upon by this class action. Some believe that class actions are always improper, and some primarily object to the mandatory aspect of the Court's certification. That belief, however, is not the law.

Counsel for the opposition also assert that the fact that Aetna will pay *Breland* counsel's fees is evidence of collusion. While the parties did agree that Aetna would pay the fees, they declined to discuss the amount so that it would not influence

negotiations. If Aetna had not agreed to pay the fees, the Court assumes that *Breland* counsel would have sought payment out of the settlement or judgment after trial. Consequently, *Breland* counsel's settlement demands would have risen and the amount of fees would have become part of the settlement negotiations. The parties' actual arrangement was preferable and proper. It does not support an allegation of collusion.

Accordingly, the Court finds that *Breland* was conducted adversarily and the settlement was reached through arms' length negotiations.

Attitude of the Members of the Class

The precise size of the class is, at this time, impossible to calculate. However, the following figures are indicative of their approximate number.

Notice was provided to Class A members in the packages that contained Robins' disclosure statement. Approximately 220,000 of such packages were mailed.

Class B members who had filed claims in the reorganization also received notice by direct mail. 111,746 packages were mailed to such persons. Notice was also provided by publication that contained a mail-in coupon to receive a package. 14,099 such coupons were received and responded to.

Class B members were entitled to opt out. However, only 3,322 filed opt out requests. 2,960 of such requests were timely.

Prior to the hearing, approximately nine objections were filed, some by individual claimants, others by attorneys representing a number of claimants. At the hearing, the objectors presented several affidavits from attorneys who opposed the settlement. Other class members, however, submitted

gratuitous notices of their support of the class action. In addition, the Robins plan of reorganization, of which the *Breland* settlement is a part, was approved by 94.38 percent of the claimants who voted.

Thus, while there is disagreement, the vast majority of the classes appears to be in favor of the settlement.

Strength of the Case on the Merits

The crux of plaintiffs' complaint is that, beginning in the early 1970's and continuing into the 1980s, Robins and Aetna allegedly conspired to limit their liability. The evidence and arguments presented to the Court indicate, however, that the case is factually and legally flawed.

The first four counts of the Third Amended Complaint (negligence, strict liability, breach of express warranty, and fraud) relate to considering Aetna a joint participant in designing, manufacturing and labeling the Dalkon Shield. *Breland* counsel admits that these claims are weak. To elevate a product liability insurer to the position of a manufacturer and distributor would require proof of conduct quite peculiar for an insurer. No such evidence was presented to the Court.

In the fifth count, plaintiffs allege a violation of civil RICO. Aetna has brought authority to the attention of the Court that stands for the proposition that civil RICO excludes recovery for personal injury. Counsel for the opposition have not presented any contrary authority.

Plaintiffs' next two counts are conspiracy claims. Plaintiffs assert that Aetna and Robins conspired to limit their liability. They further contend that Aetna itself should have recalled the Dalkon Shield or at least disclosed the risks to the public. In a similar vein, plaintiffs assert that Robins conspired with McGuire, Woods, Battle & Boothe, a law firm that represented

Robins in Dalkon Shield litigation. Because Aetna paid the costs of such representation, plaintiffs assert that Aetna is vicariously liable for the acts of the law firm.

The problematic nature of these claims is obvious. Both an insurer and an attorney owe duties to their insured/client to defend it and protect its confidences. Aetna was subject to an affirmative duty not to use or to communicate information which it received confidentially from its insured. Opposition counsel have brought no authority to the attention of the Court that indicates that an insurer has a duty to a third party that rises above its duty to its insured. Nor have they presented authority that holds that an insurer has the power to recall the product of the insured.

The vicarious liability argument is similarly flawed. Plaintiffs assert that the law firm was acting as an agent for Aetna because its fees were paid by Aetna. However, no authority has been brought to the attention of the Court that stands for the proposition that an insurer's paying counsel fees for the defense of a third party creates an agency relationship between the insurer and the law firm.

In addition to these formidable legal obstacles, the evidence presented in support of these theories is weak. There is evidence that Aetna had knowledge of the manner in which Dalkon Shield litigation was conducted. Beyond that, the evidence is limited. A special master who reviewed privileged documents testified that while there was strong evidence for a case against Robins, he could find no evidence of conspiracy with Aetna or other third parties. *See* Plaintiff's Exhibit 3A.

Lastly, plaintiffs claim that Robins and Aetna improperly settled the coverage litigation in 1987 and that they are third party beneficiaries to such settlement. Like the others, this

claim faces legal and factual obstacles. First, it is not at all clear that plaintiffs have standing to pursue a claim based on a contract between Robins and Aetna. Second, the Court's Examiner investigated the settlement and concluded that there is little ground to set it aside.

Accordingly, the Court finds that plaintiffs have a weak case on all counts. Indeed, it is Aetna's position that there is no case against it. Recognizing that the defense costs of numerous, even if meritless, cases against it would be substantial, Aetna decided it would prefer to make such funds available to claimants rather than attorneys and consequently agreed to settle. The weakness of the case against Aetna is underscored by the fact that AHP is paying a premium to Aetna, independent of the settlement outlined above, of $32 million for the policies Aetna is issuing.

Due Process

As previously mentioned, notice of the Proposed settlement was given to Class A members in the Robins mailing of its disclosure statement. As for Class B, personal notice by direct mail was sent to approximately 112,000 persons who had submitted claims in the reorganization. The class notice was also published in 1,369 newspapers throughout this country and Canada. As the Court has already determined, the notice constitutes the best notice practicable under the circumstances.

Those objecting to the settlement were afforded a full and fair opportunity to be heard. The objectors combined their efforts and presented evidence and argument through a team of three competent lawyers.

Accordingly, the Court finds that the due process rights of unnamed class members were satisfied.

Conclusion

Upon evaluation of all of the relevant factors, the Court finds that the proposed settlement is reasonable, adequate and fair. Indeed, the proposed settlement is in the best interests of both classes of claimants.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date July 26, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA RICHMOND DIVISION

IN RE:	)	
A. H. ROBINS COMPANY,	)	
INCORPORATED, Debtor.	)	Chapter 11
	)	Case No. 85-01307-R
	)	Judge Merhige
	)	(Retained Proceeding)
DALKON SHIELD CLAIMANTS'	)	
COMMITTEE in its own right and on	)	
behalf of A. H. Robins Company,	)	
Incorporated, Plaintiff,	)	Adversary Proceeding
	)	No. 87-1006-R
v.	)	
	)	
THE AETNA CASUALTY AND	)	
SURETY CO.,	)	
Defendant.	)	
GLENDA BRELAND, et al.,	)	
Plaintiffs,	)	Civil Action No.
	)	87-0315-R
v.	)	
	)	
AETNA CASUALTY AND	)	
SURETY COMPANY,	)	
Defendant.	)	

ORDER APPROVING SETTLEMENT AND DISMISSING ACTION WITH PREJUDICE AS TO THE CLAIMS OF ALL NAMED PLAINTIFFS AND CLASS MEMBERS EXCEPT CERTAIN CLAIMS OF THOSE MEMBERS OF CLASS B WHO HAVE FILED TIMELY REQUESTS FOR EXCLUSION

This Court having previously ordered that notice of a proposed settlement in these consolidated proceedings be given to all class members and that such class members be further notified of a hearing on the fairness, reasonableness and adequacy of the proposed settlement on July 7, 1988 and of their rights to object thereto; and such notice having been given in conformity with this Court's Order of April 13, 1988, as amended; and a hearing having been held on July 7, 1988 pursuant to the notice; and the Court having afforded to the parties and objectors the right to present evidence and argument at such hearing as to such settlement; and the Court having filed a Memorandum dated July 26, 1988, containing findings of fact and conclusions of law as a consequence of such hearing; and the Court having entered an Order dated July 26, 1988, in accordance with such Memorandum and now desiring to amend that Order,

It is ADJUDGED and ORDERED that said Order of July 26, 1988 be and the same is hereby amended as follows:

1. The notice given of the proposed settlement and the hearing was the best practical notice under the circumstances and provided any class member desiring to object to the settlement with fair and adequate notice of the hearing on, and of the terms of, the proposed settlement.

2. The terms of the settlement are adjudged to be fair, reasonable and adequate and its approval to be in the best interests of class members; the Stipulation and Settlement Agreement dated as of February 1, 1988 is hereby approved; and the parties are directed to implement the settlement in accordance with its terms.

3. All named plaintiffs and class members are hereby enjoined and barred from further prosecuting against Aetna any of the Settled Claims as defined in the Stipulation and Settlement Agree-

ment as of February 1, 1988, provided, however, that members of Class B who timely submitted Requests for Exclusion are not enjoined or barred from prosecuting claims for compensatory damages against Aetna.

4. Judgment is hereby entered in favor of Aetna dismissing the complaint and all claims therein, on the merits and with prejudice, as against the named plaintiffs and all class members, provided, however, that the claims for compensatory damages by members of Class B who have timely submitted Requests for Exclusion are not dismissed nor is judgment entered in favor of Aetna as to these claims. The parties are to bear their own costs except as shall otherwise be ordered by the Court. The judgment entered in accordance with this paragraph constitutes a final judgment under Federal Rule of Civil Procedure 54(b) as to all claims being dismissed, the Court determining and finding that there is no just reason for delay and that such judgment should be made final.

5. The Court will retain jurisdiction over all matters involved in the implementation of the settlement and any disputes which may arise therefrom and over such petition for fees and costs as may be submitted by class counsel hereafter.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: July 29, 1988

Notice of Judgment or Order

Entered on Docket July 29, 1988

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

FILED
JUN 16 1989
No. 88-1755
U.S. COURT APPEALS
FOURTH CIRCUIT

In Re: A. H. ROBINS COMPANY INCORPORATED
Debtor

GLENDA BRELAND, et al;

Plaintiff-Appellee

DONNA OBERG, et al

Claimant-Appellant

v.

AETNA CASUALTY & SURETY COMPANY

Defendant-Appellee

No. 88-1757

In Re: A. H. ROBINS COMPANY, INCORPORATED
Debtor

GLENDA BRELAND, et al;

Plaintiff-Appellee

CAROLYN ABERNETHY, et al

Claimant-Appellant

v.

THE AETNA CASUALTY AND SURETY COMPANY

Defendant-Appellee

No. 88-1766

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

GLENDA BRELAND, et al;

Plaintiff-Appellee

DIANE PINARD; DAWN GEBO; SANDRA CASSIER; PATRICK CASSIER

Claimants-Appellants

v.

AETNA CASUALTY & SURETY COMPANY; MCGUIRE, WOODS, BATTLE & BOOTHE;

Defendants-Appellees

A. H. ROBINS COMPANY, INCORPORATED

Debtor-Appellee

No. 88-3604

In Re: A. H. ROBINS COMPANY, INCORPORATED

Debtor

GLENDA BRELAND, et al;

Plaintiff-Appellee

ALEXIA ANDERSON, et al

Claimant-Appellant

v.

THE AETNA CASUALTY AND SURETY COMPANY

Defendant-Appellee

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

No. 89-442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEXIA ANDERSON, *et al.*,
Petitioners,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT THE AETNA CASUALTY AND SURETY COMPANY IN OPPOSITION TO PETITION

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Dated: October 10, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Did the court of appeals correctly conclude that the district court did not abuse its discretion or exceed its authority when it certified a mandatory plaintiff class under Fed. R. Civ. P. 23(b)(1)(A) in this money damages case, where separate adjudications present the risk that the defendant would be subject not merely to inconsistent judgments but to mutually exclusive, conflicting duties constituting incompatible standards of conduct?

2. Is mandatory certification in a federal court class action consistent with the due process clause of the Fifth Amendment where: a settlement of the case in conjunction with a related consensual plan of reorganization provides class members with full compensation from a Claimants Trust and the opportunity for a jury trial against the Trust; petitioners were heard directly through their own counsel in the hearing on the fairness, adequacy and reasonableness of the settlement; and other private interests, both of other class members and of respondent Aetna, would otherwise have been harmed?

RULE 28.1 STATEMENT

Respondent: The Aetna Casualty and Surety Company

Parent: Aetna Life & Casualty Company

Subsidiaries (except wholly-owned subsidiaries):

South Bend Joint Venture
Aegen International, Inc.
Mariner Brookhollow Joint Venture
ADB I
Ponderosa Homes
ABP Associates Limited
Church Insurance Partnership Agency
Hyatt Plaza
Parklake Associates
Northlake Centre Associates
Central Trust Centre Associates
Aetna, Peterson, Jacobs and Ramo Technology Ventures
Taas Associates
Portside Properties Ltd.
211 East Ontario Associates
Executive Re, Inc.
Executive Risk Management Associates

Affiliates: None

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Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) . 28

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Constitutional provision involved is the due process clause of the Fifth Amendment, which provides in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law.

The rule involved is Fed. R. Civ. P. 23(b)(1), which reads as follows:

* * *

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NO. 89-4429

ALEXIA ANDERSON, *et al.*,

Petitioners,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT THE AETNA CASUALTY AND SURETY COMPANY IN OPPOSITION TO PETITION

Respondent The Aetna Casualty and Surety Company ("Aetna"), defendant in the district court and an appellee in the court below, submits this brief in opposition to the petition for a writ of certiorari. The opinion below is reported at 880 F.2d 709.

STATEMENT

The petition for certiorari in this case and a separate petition filed the same day in the interrelated case[1]

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[1] *Rosemary Menard-Sanford v. A.H. Robins Co.*, No. 89-441. The interrelation of the two cases is described at pp. 3-6, *infra*. The Joint Appendix in the court of appeals is referred to as "J.A."

seek to overturn a comprehensive resolution of litigation arising from injuries relating to an intrauterine contraceptive device known as the Dalkon Shield. The Dalkon Shield was manufactured by A. H. Robins Company, Incorporated ("Robins"), the debtor in the companion case. Respondent Aetna was Robins' product liability insurer.

The early background and judicial involvement in Dalkon Shield controversies over the past 15 years is described in the opinion of the court of appeals (3a-28a). The petition here challenges a mandatory class certification by the district court, affirmed below, which was part of a settlement (the "Settlement") found by the district court after intensive scrutiny to be fair, adequate and reasonable. The Settlement satisfies a precondition of the merger of American Home Products and Robins, which merger in turn is a precondition of the Debtor's Sixth Amended and Restated Plan of Reorganization (the "Plan") pursuant to which a $2.475 billion Claimants Trust (the "Trust") will be established to compensate persons injured by the Dalkon Shield. Under the Settlement, Aetna will make available up to $425 million in cash and insurance for the payment of Dalkon Shield claims.

A. The Settlement And The Plan

Petitioners convey almost no sense of the nature and magnitude of the benefits made available under the Plan and the Settlement, and argue as if the loss of those benefits to other Dalkon Shield claimants would have been inconsequential. The mandatory certification in this case embodies a careful application of Rule 23 (in combination with an extraordinarily successful example of consensual reorganization under Chapter 11) to a set of unprecedented litigation circumstances:

1. The district court found, after a six-day evidentiary hearing, that $2.475 billion will be sufficient to pay in full all Dalkon Shield personal injury claims as well as expenses of administration over a reasonable period of time (21a-22a, 165a). Cash payments into the Trust when the Plan goes into effect, principally $2.255 billion from American Home Products and $75 million from Aetna, will with interest equal or exceed $2.475 billion.[2] The court of appeals upheld the factual finding that the Trust "will be sufficient" to achieve the goal of "full payment of all compensatory damages suffered by all Dalkon Shield claimants who have properly filed claims" (84a). Petitioners do not ask this Court to disturb that finding. Before this Court, the sufficiency of the Trust is an established fact.[3]

2. Over and above the cash, interest and income which the Trust will receive (including $75 million from Aetna), Aetna will provide $250 million in insurance coverage (the "Primary Excess Policy") against any remaining risk that the Trust will be insufficient to pay all claims (26a).

3. The Settlement was negotiated, structured and drafted in the context of a complex Chapter 11 con-

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[2] Interest and income on the cash payments to the Trust are expected to be at least several hundred million dollars (Summary of Payments To Claimants Trust, J.A. 1852 n.*). The Trust will distribute, on a pro rata basis, additional sums in lieu of punitive damages if funds are available after the payment of compensatory claims (Dalkon Shield Trust Claims Resolution Facility ("CRF"), J.A. 1955).

[3] Petitioners assert that the fund may be insufficient (*e.g.*, Pet. 10, 13-14, 19). These assertions overlook the finding—unchallenged in the court below or in this Court—that the fund is in fact sufficient to pay potential claims in full.

sensual reorganization of Robins (*see* 19a-27a, 145a-46a, 150a-55a, 163a-66a) which, together with the Settlement in this case, will result in full compensation of petitioners' claims.[4] Thus, the classes in this case are defined with reference to compliance with initial procedures for claims against the Trust. Class A includes approximately 195,000 claimants, all of whom are entitled to claim against the Trust because they timely filed proofs of claim and questionnaires in accordance with the procedures established by the bankruptcy court (155a-56a). Class B includes approximately 125,000 claimants (173a) who failed to comply with those procedures (156a). The vast majority of Class B members are not eligible to claim against the Trust (*see* CRF, J.A. 1955; Special Note To Women Who Used The Dalkon Shield: How Your Dalkon Shield Claims Will Be Treated, J.A. 1862).[5] (Petitioners make no claims concerning members of Class B (Pet. 3 n.1).) To compensate Class B members under the Settlement, Aetna will make available two "Outlier Policies" in the total amount of $100 million. Both the Trust and the Outlier Policies will be governed by the terms of a single Claims Resolution Facility (Summary of Aetna Insurance Coverage, J.A. 2031).

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[4] A number of these petitioners twice before attempted to sever litigation against Aetna from the reorganization proceeding. Both times, the court of appeals barred the attempt and this Court denied certiorari. *See Oberg v. Aetna Cas. & Sur. Co. (In re A. H. Robins Co.)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1246 (1988); *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).

[5] Certain Class B members (those who are "time-barred") may recover from the Trust on a subordinated basis, *i.e.*, if funds remain after Class A claims have been paid (155a; CRF, J.A. 1955).

4. Under the Claims Resolution Facility, both classes are given two options for filing claims under which the Trustees waive all substantive defenses (CRF, J.A. 1950-51). In a third option, arbitration, the Trustees will waive the defense of no product defect (CRF, J.A. 1952). Additionally, Class A members have an absolute right to a jury trial against the Trust (which substitutes for Robins as the defendant), with attornies of their choosing in the local venues where their cases could otherwise have been brought (27a, 73a). The settlement, arbitration or trial of claims is governed by otherwise applicable law (CRF, J.A. 1955).[6]

5. The notice of the Plan to claimants (members of Class A) described both the Plan and the Settlement. Almost 95 percent of the votes were in favor of the Plan (80a). Upon notice of their right to opt out, almost 98 percent of Class B members elected to remain in the class (*see* 173a).

6. Under the terms of the Settlement, merger agreement and Plan, had the district court not approved the Settlement and certified a mandatory class for punitive damages, there would have been no merger, no Plan, no $2.475 billion Trust (or $75 million in cash or $250 million in insurance coverage for the Trust from Aetna), and no $100 million of Outlier Policies. In addition to the interrelation of the Settlement and the Plan according to their terms, a further interrelation arose from the district court's consolidation of the instant

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[6] The Trust "shall at all times, consistent with its purposes, minimize the intrusion" into the sexual history of the claimant (CRF, J.A. 1955). Even when a claimant chooses to litigate against the Trust, the Trustees may waive defenses relating to product defect and causation (CRF, J.A. 1953).

litigation and the adversary proceeding for contribution filed against Aetna in the reorganization by the Official Dalkon Shield Claimants' Committee (the "Committee") (139a-41a). The Committee, on behalf of Robins, sought contribution from Aetna. Aetna denied the claim but, alternatively, counterclaimed against Robins for contribution on the theory that if Robins had a claim against Aetna, Aetna would have a like claim against Robins. Finding the action duplicative of issues in the Breland class action, the district court consolidated the two matters and directed Aetna to respond. The consolidation, and Aetna's counterclaim, further demonstrate the factual linkage between the reorganization and the instant case.

7. The certification issue before the court of appeals was whether the district court had abused its discretion in certifying the class. If the certification had been reversed by the court of appeals, the Trust would have lost $75 million in cash and $200 million of coverage under the Primary Excess Policies. Class B members would have lost half ($50 million) of the funds otherwise available for them under the Outlier Policies. The same adverse impacts on both classes would result from the reversal of the certification sought by petitioners in this Court.

B. Litigation Against Aetna Under The "Off-Policy" Theories.

1. As claims mounted and Robins' financial situation became more precarious, Dalkon Shield claimants focused on Aetna as another " 'deep pocket' " (13a). By early 1985, complaints were being filed against Aetna on so-called "off policy" theories, that is, theories which sought to hold Aetna liable for its own conduct rather than the conduct of its insured, Robins, and to recover

from Aetna's assets rather than from the proceeds under the insurance policy.

2. The instant case began in 1986 when respondent Glenda Breland and six other plaintiffs sued Aetna on behalf of themselves and all other persons who could claim injuries or potential injuries from the Dalkon Shield (the "*Breland* litigation"). Aetna stipulated that, if a class were certified, it would agree to have issues of individual causation and damages resolved by the claims resolution process that would be a part of any reorganization of Robins (71a). In December 1986, over a year before Settlement was reached, and after allowing interventions for the purpose of opposing class certification, the district court conditionally certified the action as a class action under Rule 23(a) (134a-35a). Contrary to the statement in the petition (Pet. 9), the district court did not then determine whether the class would be mandatory. It did, however, determine that the requirements of Rule 23(a) were satisfied.[7] It was not until April 1988, nearly sixteen months later and after additional discovery, briefing and argument, that the district court certified a mandatory class. Subsequently, after conducting the further hearing required by Rule 23(e), the district court found the Settlement

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[7] Petitioners assert that their case against Aetna is particularly weak with respect to women whose Dalkon Shields were removed prior to February 1975 "or perhaps as late as March 1978" (Pet. 6). Petitioners do not, however, ask the Court to disturb the findings below—unchallenged on appeal—that the class action prerequisites of commonality and typicality were satisfied in this case. A proper class does not require that all members have equally strong claims on the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (Rule 23 confers no authority "to conduct a preliminary inquiry into the merits . . . in order to determine whether [case] may be maintained as a class action").

to be fair, adequate and reasonable. Petitioners were heard through their own counsel at that hearing (79a-80a). Appeals to the Fourth Circuit followed.

3. The "off-policy" theories in the original complaints against Aetna alleged negligence, express and implied warranty, misrepresentation, conspiracy, fraud, and RICO violations. These earlier complaints "alleged virtually the same substantive claims" as those alleged by plaintiffs in the instant case (13a).

4. Both the district court and the court of appeals found the claims against Aetna in the *Breland* litigation to be weak legally and factually. Central to the off-policy complaints is a theory that Aetna had a duty to disclose publicly any deficiencies in the Dalkon Shield. The court of appeals concluded that "[o]bviously, the carrier has no such duty and no court, so far as we know, has ever so held" (89a). The court of appeals, affirming a like determination by the district court, stated that "Aetna had no dealings with any Dalkon Shield claimants, assumed no duty to such claimants and could not be liable to Dalkon Shield claimants under accepted insurance law" (88a; *see also* 88a-89a, 175a-76a). With respect to allegations of document destruction, the court of appeals stated that the "record is simply devoid of any evidence of any wrongful conduct on Aetna's part . . . " (90a). Prior to the point in the Robins reorganization when the bankruptcy court enjoined litigation against Aetna, Aetna had filed motions to dismiss for legal insufficiency in cases asserting off-policy theories. As the court of appeals noted, each of the several dozen such motions which had been ruled upon "had been granted" (14a & n. 11). Four other complaints had been voluntarily dismissed (*id.*). Thus,

no court anywhere had sustained the legal sufficiency of off-policy theories against Aetna.

C. The Mandatory Certification

1. Aetna argued below that the disclosure contemplated by the off-policy theories would disrupt fundamentally the traditional contractual duty of an insurer—heretofore uniformly recognized in all jurisdictions in the United States, without exception—to defend its insured, to maintain the confidentiality of information obtained from the insured in the course of the insurer-insured relationship, and to maintain loyalty to the insured arising from the duty to defend. Given Aetna's duties of defense, confidentiality and loyalty, separate adjudication of the off-policy theories would expose Aetna (and all other product liability insurers) to the risk of "incompatible standards" within the meaning of Rule 23(b)(1)(A). Information made public by Aetna pursuant to a new duty to disclose could not be confined to the state imposing that duty. The very disclosures required by one state could be a basis for imposing liability on Aetna to the insured (*e.g.*, on theories of breach of contract, negligence and bad faith) in other states which retain the traditional duties of confidentiality.

2. The district court found that Aetna's alleged liability "must be premised on facts arising out of [Aetna's] relationship" with its insured, Robins (148a). The district court further found that multiple adjudications of Aetna's obligations incident to its relationship with its insured "could yield incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others" (153a). The district court thus recognized that Aetna's conduct of the business of li-

ability insurance was at risk of being subjected to incompatible legal requirements.

D. The Opinion Below

1. The court of appeals upheld the district court's findings concerning the risk of incompatible standards. The court stressed "the uniqueness of this case" as the "overriding fact" (66a).[8] In affirming the district court, the Fourth Circuit noted that the relationship of Aetna to its insured "goes to the very heart of the plaintiffs' case here and overhangs the other issues in the litigation" (68a). Individual suits in different courts would therefore involve the risk not only of "varying" but of "contradictory" legal decisions regarding the insurer-insured relationship (81a). "The result would be chaotic" (*id.*). This situation provides "the very conditions contemplated in Rule 23(b)(1)(A) for class certification herein" (70a). Petitioners do not contest here these findings of the two lower courts, which rest upon contract and state law.

2. The court of appeals placed this case in context by a painstaking examination of class actions generally (*see* 32a-66a). Acknowledging an earlier "reluctance" by some courts to employ Rule 23 in mass tort cases (45a), the court saw a clear movement toward use of Rule 23 in such cases (52a).[9] This "new attitude," the

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[8] Petitioners wrongly imply (Pet. 11) that the court saw uniqueness only in the number of claimants. The court followed that preliminary observation by a discussion of several key circumstances (*see* 66a-69a), one of which—the risk of incompatible standards—we discuss in text immediately following

[9] Petitioners challenge the court's discussion of these cases for failing to acknowledge "at that point" in the court's opinion that these cases upheld opt-out classes under Rule 23(b)(3) (Pet. 13).

court showed, has "found expression in a number of recent cases" (*id.*; *see also* 54a-61a) and has been urged by numerous commentators (*see* 45a-52a). The court pointed out the necessity for "rigorous analysis" of the particular case by the district court (40a), and stated that flexibility in applying the rule will best serve not only efficiency but "justice for the affected parties" (65a-66a). The court considered the important role which certification can play in facilitating settlement of complex litigation, as had occurred in this case, and the propriety of taking into account settlement as part of the discretionary decision whether to certify in a particular case (61a-65a, 74a). It was "unthinkable," the court said, to "permit a small number of claimants who are seeking actually to promote their own interests largely at the expense of the other claimants to frustrate a class certification" (79a) when "there is a ready remedy for expeditious adjudication and fair recovery available for the full 100% of claimants through a properly constructed class action . . . " (80a).

3. Having found "no abuse of discretion on the part of the District Judge in his certification herein under these circumstances" (74a), the court turned to the argument, based upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that due process requires an opt-out provision. The court found it unnecessary to resolve whether *Shutts* has implications for mandatory class actions in federal courts. The issue, the court said, is due process (75a-76a). Due process was satisfied in this case because the Plan gives to petitioners and every

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Petitioners' hedged criticism is overly artful: when the court first discussed these cases earlier in its opinion, it explicitly pointed out as to each one that the court upheld a (b)(3) class (*see* 54a, 55a, 56a, 57a, 58a).

other member of Class A the absolute "right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial" (76a) with her own lawyer in a forum of her choosing under normal venue rules.[10]

4. The court then rejected as overly broad petitioners' reading of other opinions in which courts of appeal had reversed class certifications (76a-78a). The court concluded its analysis of the class certification by disposing of a few other objections not pressed here (78a-83a), and then sustained the district court's determination that the Settlement was fair, adequate and reasonable (83a *et seq.*), which ruling petitioners do not challenge in this Court.

REASONS FOR DENYING THE WRIT

Petitioners acknowledge that their "entire rationale for this case" is their belief that "the Claimants Trust may be inadequate to pay all claimants in full" (Pet. 13-14). Since that premise is contrary to the determinations below, unchallenged in this Court, that the fund will be sufficient, this case does not present an appropriate vehicle for considering either of petitioners' questions. Beyond this, there are other independent reasons why neither question merits review by this Court.

I. THE RULE 23(b)(1)(A) ISSUE DOES NOT WARRANT REVIEW

Petitioners present no conflict or other reason warranting review of the application below of Rule

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[10] Class B members have the right to opt out and seek compensatory damages by trial from Aetna.

23(b)(1)(A). As the court of appeals and the district court found, "the risk of . . . incompatible standards of conduct for the party opposing the class" is patent in this case.[11]

If petitioners mean to argue that, notwithstanding a risk of incompatible standards, there is something in (b)(1)(A) that barred mandatory certification as a matter of law, they have failed to identify what that legal bar might be. They have not identified a question of law for the Court.[12] If petitioners are simply asking

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[11] There is an independent and sufficient ground upon which to affirm the judgment below. As petitioners recognize (Pet. 19), the district court, in addition to finding a risk of incompatible standards, found that allowing separate adjudications "would severely impede the interests of other class members as a practical matter" (154a). A risk of impeding the interests of other class members is a basis for mandatory certification under Rule 23(b)(1)(B), not (b)(1)(A). Accordingly, Aetna argued in the court of appeals that the mandatory class could be certified under Rule 23(b)(1)(B) as well as (b)(1)(A). The argument was highly fact-specific: the Settlement brought a unique combination of benefits to class members that could not be obtained by any member through individual adjudication; such a combination of benefits constitutes "interests" of other class members within (b)(1)(B); absent mandatory certification, that combination of benefits would have been lost; and separate adjudications therefore would impair or impede the interests of other class members. The court of appeals affirmed the mandatory class under (b)(1)(A) and did not reach (b)(1)(B). Were the Court to grant certiorari, Aetna would argue the (b)(1)(B) justification as well, and it is possible that the Court would not need to reach the (b)(1)(A) issue raised by petitioners.

[12] The Court has declined before to adopt the "extreme position" that a nationwide mandatory class "may never be certified" in a category of cases involving some particular subject matter. *See Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). The certification of such a class, "like most issues arising under Rule 23, is

the Court to review an exercise of discretion unanimously concurred in by two lower courts, they raise no issue that warrants granting their petition. *Cf. Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"). If petitioners are inviting this Court independently to exercise its discretion, they have sorely misconceived this Court's certiorari jurisdiction.[13]

A. The Decision Below Is Not In Conflict With Any Decision Of Any Other Court Of Appeals.

As petitioners would have it, all that was involved in this case was the possibility of Aetna "winning some cases and losing others" (Pet. 11), and such possibility of "inconsistent results" has, they say, been "rejected by every court of appeals that has considered it as a basis for mandatory certification under Rule 23(b)(1)" (Pet. 15). But not all "inconsistent results" involve "incompatible standards." Differing standards of care, for example, can ordinarily be complied with by adhering to the most demanding standard, as can differing duties to disclose, so long as elsewhere there is not a bar on disclosure, as there would be in this case. Typically, entry of a money judgment for a plaintiff in one case and dismissal of a money claim in another

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committed in the first instance to the discretion of the district court." *Id.* at 703.

[13] Such an invitation seems to underlie petitioners' assertion that the Settlement and the Plan are not interdependent at the appeal stage (Pet. 14). Petitioners ignore the substantial adverse consequences on other class members of an appellate reversal. *See* p. 6, *supra*. In any event, the district judge applied Rule 23 in the context of a uniquely interrelated Settlement and Plan. It is that exercise of discretion which was reviewed by the court of appeals.

case arising out of the same events do not entail changes or conflicts in legal doctrine that give rise to a risk of incompatible standards. The Fourth Circuit itself has stated that money damage claims do not "normally" satisfy Rule 23(b)(1)(A). *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986). The decision below is not in conflict with the generally accepted view that Rule 23(b)(1)(A) does not allow mandatory certification when the only consequence of separate adjudications is that some plaintiffs may recover money damages while others do not. This is the rare case in which the legal theories advanced by class members seeking money damages could create mutually exclusive, conflicting duties subjecting Aetna to incompatible standards.

As this case illustrates, incompatible standards in substantive law can be just as disruptive of business conduct as incompatible standards contained in injunctions or declaratory judgments. To hold as a matter of law that (b)(1)(A) is unavailable to protect a defendant from the risk of incompatible standards in substantive law would be wholly without foundation in any language of the rule, and contrary to its purposes and to common sense, fairness and efficiency. Not surprisingly, petitioners fail to identify any such rule of law. None of the cases cited by petitioners (Pet. 15-16) presents a conflict between the Fourth Circuit and any other circuit in applying the incompatible standards requirement.

In their attempt to establish a conflict, petitioners rely on a decision rendered 14 years ago, *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *McDonnell* reversed a district court certification based upon a finding that, if separate actions were main-

tained, "defendants might be held liable in some actions but not in others." 523 F.2d at 1086. That is the ordinary risk in a money damages case. In the instant case, however, as we have shown, far more is involved than simply the risk that Aetna might have to pay damages to some plaintiffs and not to others.

In dictum in *McDonnell*, the Ninth Circuit went on to observe that (b)(1)(A) requires a risk of incompatible standards "in fulfilling judgments." *Id.* at 1086. A year later, the Ninth Circuit said that the risks contemplated by (b)(1) "ordinarily" are not present in a money damages case, and found "no circumstances" in the case before it to render that view "inapposite." *Green v. Occidental Pet. Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976).[14] The Fourth Circuit subsequently cited *Green* as support for its statement in *Zimmerman* that (b)(1)(A) is not "normally" available in a money damages case. 800 F.2d at 389. There is no basis for concluding that the Ninth Circuit, given the district court's finding of a risk of incompatible standards in the instant case, would hold that (b)(1)(A) is unavailable as a matter of law.

Petitioners cite *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), but that is another case stating the unexceptionable proposition that the "fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)." *Id.* at 305. The Fourth Circuit said essentially the same thing in *Zimmerman*. Nothing in the opinion below

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[14] *Green* involved an action under a federal statute, so there was no possibility of incompatible standards in the sense relevant here.

suggests that the Fourth Circuit disagrees with the general statement in *Bendectin*, and nothing in *Bendectin* suggests that the Sixth Circuit would have reversed the certification in this case.

The remaining cases cited by petitioner to establish a conflict do not construe (b)(1)(A) at all:

In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), does not even construe Rule 23. The court held, over a vigorous dissent, that the mandatory certification in that case had the effect of enjoining pending state court actions, contrary to the Anti-Injunction Act. 28 U.S.C. § 2283. The court held that mandatory certification was not within that Act's exception for injunctions "necessary in aid of [the court's] jurisdiction." 680 F.2d at 1182. The court never addressed Rule 23.

In Re School Asbestos Litigation, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986), is not a case under Rule 23(b)(1)(A). In considering Rule 23(b)(1) the court focused exclusively on a limited fund issue under (b)(1)(B) (789 F.2d at 1002-08), and the case is thus not relevant here. Rule 23(b)(1)(B) makes no mention of incompatible standards, and its focus on risks to other class members is the opposite of the focus under (b)(1)(A) on risks to the party opposing the class. After examining the "special elements of the (b)(1)(B) class" in the context of that case (789 F.2d at 1002, 1005), the Third Circuit reversed. This decision does not establish a conflict between the circuits.

In re Temple, 851 F.2d 1269 (11th Cir. 1988), also involved a certification based on "limited assets" (*id.* at 1270), a (b)(1)(B) ground. The Eleventh Circuit reversed because the district court had failed to give class

members any opportunity to present evidence contesting the finding of a limited fund, which finding the court of appeals considered "premature and speculative." *Id.* at 1272. *Temple* does not involve certification based upon the (b)(1)(A) risk that the party opposing the class would be subject to incompatible standards.[15]

B. The Question Presented Is One Of First Impression On Unique Facts, And The Decision Below Is Not A Departure From Any Usual Practice.

Petitioners are unable to adduce a single case where multiple adjudications would have created a risk of incompatible standards under substantive law such that compliance with the law in one jurisdiction might violate the law in another. In none of the opinions cited by petitioners did the court of appeals have occasion even to discuss some particular substantive area of law to see whether multiple adjudications would create such a risk. It is evident that the likelihood of such a risk arising is quite rare, for it requires more than mere differences in legal standards.

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[15] Petitioners further attempt to imply a conflict from the "reluctance" of another court that upheld a certification (*see* Pet. 17, citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir.), *cert. denied*, 108 S. Ct. 695 (1988)), and from decisions that upheld or held open the possibility of mandatory certifications because of circumstances not present in the instant case (*see* Pet. 16, 17, citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978); *In Re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Bendectin Prods. Liab. Litig.*, *supra*; *In Re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). The attempt is unavailing; if anything, these cases underscore how fact-dependent are applications of Rule 23(b)(1).

Because the requisite circumstances are so rare, petitioners are wrong in asserting that the certification below was a departure from "accepted practice" and "accepted standards" (*see* Pet. 15, 17). Petitioners apparently consider a "practice" as simply the *results* of prior (b)(1) cases, ignoring the fact that none presented a risk of incompatibility of the type presented here, all involved very different circumstances, and several involved (b)(1)(B) rather than (b)(1)(A).[16]

C. Petitioners' Predictions Of Far-Reaching Impacts Rest On A Misconstruction Of The Decision Below, And Are Otherwise Incorrect.

Petitioners' predictions of far-reaching impacts center not on the result below but on what they describe as the "rationale adopted by the court of appeals" (Pet. 18). In petitioners' rendering, the Fourth Circuit sustained the mandatory class merely because of considerations of efficiency (*id.*). Petitioners assert that since this justification would "apply to most mass tort cases and to all class certifications sought under all sub-parts of Rule 23," the rationale below would "obliterate" the differences among the subparts of Rule 23 (*id.*).

Petitioners' argument simply ignores the finding by the district court that separate adjudications against Aetna relating to the insurer-insured relationship would

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[16] Petitioners are also incorrect in asserting that every "appeals court that had considered a mandatory class of any kind under Rule 23(b)(1) had rejected it" (Pet. 16). The Second Circuit has upheld (in a mandamus proceeding) the certification of a mandatory (b)(1) class for punitive damages. *See In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 861-62 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). In the subsequent appeal, the Second Circuit found it unnecessary to consider again the mandatory class certification. *In re "Agent Orange" Prod. Liab. Litig.*, *supra*, 818 F.2d at 167.

create a risk of incompatible standards, and the court of appeals' endorsement of that finding (*see* 70a, 81a) ("chaotic" result from separate adjudications).[17] The specific application by both courts below of the distinct requirement of (b)(1)(A) belies petitioners' rendering of the court of appeals' "rationale," and negates any prediction that the Fourth Circuit has made the other subparts of Rule 23 superfluous. Under the approach of the court below, only cases presenting a risk of incompatible standards to the party opposing the class will be certified under (b)(1)(A), and those will be rare among cases involving only separate claims for money damages.[18]

Petitioners insist that the controlling factors should have been "the opportunity to litigate the central issue in a different forum, which might be more convenient

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[17] The risk of incompatible standards was not the only factor in addition to efficiency that the court of appeals weighed. The court considered the interests of 95% of other class members who want to be compensated under the Settlement and the Robins Reorganization Plan, and the inevitable delay in the reorganization because, absent approval of the Settlement, if Aetna were sued individually, it would have claims for contribution against Robins (70a-71a). It was not improper for the court also to consider the burdens that would be imposed on federal and state judicial systems by separate adjudications against Aetna.

[18] *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1545 (11th Cir. 1987) (cited at Pet. 18), stated "reluctantly" that (b)(1)(A) is available only in cases seeking injunctive and declaratory relief. The court did so in the apparent belief that if "compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections . . . meaningless." *Id.* The other subsections are not meaningless if certification under (b)(1)(A) is allowed only when there is a risk of incompatible standards emerging in substantive law, injunctions, or declaratory judgments.

for the victims, which might apply different and perhaps more favorable law . . . and which would afford the victims an opportunity to have their own counsel who could emphasize a different theory of the case or . . . different evidence" (Pet. 18). This contention is premised upon an asserted right to compensation from a particular defendant, *i.e.*, Aetna, notwithstanding that full compensation is available from another source (the Trust) which, in any event, receives cash and insurance coverage from Aetna. There is no such right. Moreover, the charge is wrong in every particular with respect to compensation from the Trust. Claimants may use counsel of their choosing. Venue is "unchanged" by the Reorganization (73a), and the normal venue rules therefore apply. Claims, whether settled or litigated, are governed by the law "that is or would have been applicable" in determining the liability of Robins, "notwithstanding the pendency of the Chapter 11 case" (CRF, J.A. 1955). Claimants are thus not inhibited in seeking full compensatory damages.

Furthermore, it is petitioners who would render (b)(1) meaningless. Most of the interests advanced by petitioners in individual control of separate actions could be advanced by plaintiffs in any money damages (or injunction) case, and all could be advanced in any case under state law. If, as petitioners would have it, these considerations always controlled, there never could be a mandatory certification under (b)(1)(A) or (B), or (b)(2), all of which would have been effectively repealed.[19]

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[19] Rule 23(b)(3) explicitly requires a district court to take into account "the interest of members of the class in individually controlling . . . separate actions." Rule 23 (b)(1) does not. That difference does not mean that the interest in individual control is irrelevant under (b)(1), but it can hardly be required as a matter

According to petitioners, the Fourth Circuit justified a mandatory class on the basis that preservation of the right to a jury trial against the Trust retained for petitioners the "functional equivalent" (the phrase is petitioners') of an opt out. This supposed "major new interpretation of Rule 23 . . . further supports plenary consideration by this Court" (Pet. 19).

The "major new interpretation of Rule 23" is, however, not contained in, and certainly is not squarely presented by, the decision below. The court of appeals initially referred to the right to a jury trial in response to due process objections to the mandatory class (75a-76a). It noted that right again when it concluded that the district court acted in accordance with the general rule in certifying under (b)(1)(A) even though the action could have been certified under (b)(3) (82a). There is no suggestion by the court that in the absence of a risk of incompatible standards a mandatory certification under (b)(1)(A) would nevertheless have been proper because of the right to a jury trial. If that right bore upon the court's application of Rule 23 at all (as distinct from the due process clause), it was as a reason to affirm the ultimately discretionary decision of the district court to certify a mandatory class in the presence of the risk of incompatible standards. It is surely proper that preservation of the right to a jury trial be taken into account as part of the overall judgment whether to certify a mandatory class (and whether the Settlement was fair, adequate and reasonable).

Further, to the extent the opportunity for a jury trial against the Trust bore upon the court's decision,

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of law to be dispositive, as petitioners would have it. If petitioners' challenge is instead to the exercise of discretion by the district court, it does not support an exercise of certiorari jurisdiction.

this case is unique. It took an extraordinary confluence of circumstances for a mandatory certification both to end litigation against the defendant and preserve an opportunity for jury trial for compensation. It was only the interrelation of the Plan and the Settlement in this case that made possible this unprecedented result. Such a unique set of circumstances militates against review by this Court.

II. THE DUE PROCESS ISSUE DOES NOT WARRANT REVIEW

A. The Court Below Correctly Made A Highly Fact-Bound Application Of The Due Process Clause In This Case.

The constitutional question is whether the court below correctly concluded that the due process clause of the Fifth Amendment is satisfied in the unique and complex circumstances of this case. Although petitioners seize upon the court's statement that the right to jury trial satisfied due process concerns (Pet. 22-23), petitioners' due process challenge, by its very nature, cannot be assessed without regard to the full factual context of this case.[20]

That context provides overwhelming support for the conclusion that the certification and settlement in this case amply comport with the due process clause. Among the relevant considerations (few of which are acknowledged in the Petition) are:

(a) the safety and sufficiency of the Claimants Trust, as augmented by the Primary Excess Policy (so that petitioners have not been deprived of any property);

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[20] This Court " 'reviews judgments, not statements in opinions.' " *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *accord, FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978).

(b) the options for full recovery short of litigation or arbitration against the Trust, and, upon the exercise of such options, the waiver by the Trust of all substantive defenses (CRF, J.A. 1951-52);

(c) the preservation of the opportunity for jury trial against the Trust, and the opportunity of a claimant to employ counsel of her own choosing in such litigation;

(d) the applicability of normal venue rules in such litigation (73a);

(e) the applicability to the settlement or trial of claims of the law "that is or would have been applicable" in determining the liability of Robins "notwithstanding the pendency of the Chapter 11 case" (CRF, J.A. 1955);

(f) the finding by the district court, affirmed by the court of appeals, and not challenged here, that the representative parties fairly and adequately represent the class (78a-79a; 149a);

(g) the fact that these petitioners were heard directly, through their own counsel, in the hearing conducted by the district court pursuant to Rule 23(e) on the fairness and adequacy of the Settlement;

(h) the interrelation of the Plan and the Settlement; and

(i) the fact that the district court's certification was bottomed not merely on efficiency but on avoiding unfairness to the hundreds of thousands of other class members who would have totally lost the benefits of the Plan had the district court not certified a mandatory class for punitive damages, and on avoiding

unfairness to Aetna, which faced the risk of incompatible standards from separate adjudications.[21]

The specificity of circumstances in this case distinguishes it from cases in which the Court has taken jurisdiction to make due process determinations. Such cases typically have involved ongoing government programs or practices, and a procedural question the resolution of which would govern the program or practice in the future. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Such an opportunity for guidance does not exist here.

Further, such cases have involved the traditional due process conflict between private interests in more procedure and governmental interests in less procedure. In the present case, however, private interests are arrayed against other private interests. More procedure in the form of individual adjudication threatens other private interests, both of other class members and of Aetna. Petitioners are therefore wrong when they say that the sole balance in this case is between the "individual's interest in her own adjudication" and the

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[21] *Cf. Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-21, 326 (1985) ("flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution" than formal adversary procedures; court must weigh "marginal gains from affording an additional procedural safeguard" against "societal cost of providing such a safeguard"); *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) ("degree of potential deprivation" bears upon due process requirements); *United States v. Kras*, 409 U.S. 434, 445-46 (1973) (practical means of relief other than the one preferred by the claimant).

"societal interest" (*see* Pet. 23). Petitioners in fact are asking the Court to mediate among conflicting private claims.

B. If *Phillips Petroleum Co. v. Shutts* Has Implications For Class Actions In Federal Court, This Is Not The Case In Which To Determine Them.

Petitioners assert that the court below "has plainly not followed the clear mandate" in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (Pet. 21). Petitioners apparently believe that *Shutts* substantially limits the utility of Rule 23 by mandating in all money damage cases in federal court an opt-out right for any plaintiff class member (*see* Pet. 21-22).

There is, however, no conflict between *Shutts* and the decision below. Unlike the decision below, *Shutts* involved a class action in *state* court. *Shutts* decided a question of the personal jurisdiction of a state court over unnamed plaintiff class members whose contacts with the state were insufficient to satisfy the due process clause of the Fourteenth Amendment. *Shutts* did not involve a question of the procedures required by the Fifth Amendment in the presence, as in this case, of minimum contacts with the sovereign that created the court, the United States.[22]

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[22] The question presented in the petition for certiorari in *Shutts* was whether a "state court in a class action" can "exercise jurisdiction" over unnamed class members "who have had no contact with the forum state. . . . " Petition For A Writ Of Certiorari To the Supreme Court Of The State Of Kansas at "Questions Presented," *Phillips Pet. Co. v. Shutts, supra*. The petitioner's argument in *Shutts* was that, unless "out-of-state plaintiffs affirmatively consent, the *Kansas courts may not exert jurisdiction* over their claims." 472 U.S. at 806 (emphasis added). The petitioner in *Shutts* (the defendant in the class action), had standing to raise

Further, the class certification in *Shutts* was under the Kansas equivalent of Rule 23(b)(3). That rule is bottomed on convenience and system economy, and focuses on whether it would be fair and efficient *to* certify. Rule 23(b)(1), by contrast, is applicable where *not* to certify would be unfair because separate adjudications will risk impairing the interests of other class members or leaving the party opposing the class subject to incompatible standards. Both risks are present in the instant case, and they weigh heavily in the due process balance. Neither risk was present in *Shutts*. Indeed, *Shutts* expressly limited its holding to cases where "the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law." 472 U.S. at 811 & n.3. Separate adjudications of money damage claims typically do not risk leaving the party opposing the class subject to incompatible standards. The disclaimer in *Shutts* with respect to cases other than for money damages is reasonably read to encompass this case, which involves risks from separate adjudications not present in the typical money damages case.

Thus, *Shutts* does not directly govern here. At most, the question is whether *Shutts* has implications for mandatory class actions in federal courts. But there is no conflict among the circuits or with any decision of this Court as to whether there are such implications.

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the due process claim of absent plaintiff class members only because a state "judgment issued without *proper personal jurisdiction* over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Id.* at 805 (emphasis added). This Court held that the consent afforded through an opt-out procedure was sufficient to sustain the state court's jurisdiction over plaintiff class members otherwise lacking minimum contacts with the state. *Id.* at 812.

Petitioners are wrong in their assertion (Pet. 21) that the Eleventh Circuit in *In re Temple* "concluded that the ruling [in *Shutts*] applies fully to federal court litigation." The Eleventh Circuit expressly recognized that it did not need to reach the *Shutts* issue. 851 F.2d at 1272-73 n.5. The opinion merely observes that *Shutts* "may" provide a right to opt out in a money damages case, and that "no federal appellate court has yet so held . . . . " *Id.* In *School Asbestos Litigation* (Pet. 21-22) the Third Circuit found "consideration of [*Shutts*] unnecessary." 789 F.2d at 1007-08. The article cited by petitioners (Pet. 21) does not reach a firm conclusion (*see* 75a; Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 30-31 (1986)).[23] In any event, any question concerning *Shutts*, if there is one, is not likely to arise with any frequency because money judgment cases will only rarely satisfy the preconditions for mandatory certifications under Rule 23. It is a question better left to be refined if and as it arises in the federal system.

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[23] Petitioners' citation of *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (Pet. 22) is inapposite. *Martin* did not involve the rights of members of a class. Moreover, the opinion specifically notes that class actions are an exception to the very statement quoted in the Petition (*see* 109 S. Ct. at 2184 n.2) and does not mention *Shutts*. Petitioners assert that the Third Circuit employed a different "spirit and method of analysis" (Pet 23) in *In Re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (1989), *cert. denied sub nom. Chicago Land & Title Co. v. Tucson Unified School Dist.*, No. 88-2050 (Oct. 2, 1989). If such differences exist, they do not establish a conflict. Indeed, the Third Circuit had previously affirmed the mandatory class certification in that very case, *see In Re Real Estate Title & Settlement Servs. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988), and the denial of a motion to opt out by one of the class members, *Appeal of Arizona*, 815 F.2d 696 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: October 10, 1989

No. 89-442

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALEXIA ANDERSON, ET AL.,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, ET AL.,

Respondents.

BRIEF OF GLENDA BRELAND, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Representatives of a plaintiff class in excess of 300,000 Dalkon Shield IUD claimants commenced by Glenda Breland, et al. against The Aetna Casualty & Surety Co. ["Aetna"] oppose the granting of a writ of certiorari in this case. The class of tort claimants will be fully compensated both individually and collectively through Trust Funds created under the Plan of Reorganization which was confirmed in Chapter 11 Bankruptcy Proceedings involving the A.H. Robins Co. ["Robins"] according to court findings entered after extensive hearings and affirmed on appeal. Aetna, as part of the *Breland* class settlement, will be contributing significant cash and insurance sums to these trust funds. Some 529 claimants represented by six lawfirms have petitioned for certiorari on the narrow issue that notwithstanding judicial findings of full compensation for their claims which they do not now challenge, and notwithstanding judicial findings that the amount being paid by Aetna in the *Breland* class settlement is fair and adequate for the class which they do not now contest, a non-opt out *Breland* settlement class nevertheless violates Rule 23 and due process standards.

Class representatives are seven women on behalf of a comprehensive class of Dalkon Shield IUD claimants against Aetna the insurer for Robins, manufacturer of an intrauterine device known as the Dalkon Shield. This case, originally commenced in the United States District Court for the District of Minnesota on April 9, 1986, was transferred on April 28, 1986 to the Eastern District of Virginia which also was the forum presiding over related Dalkon Shield tort claims against Robins, then engaged in Chapter 11 Bankruptcy proceedings.[1]

---

1. The District Court and the Bankruptcy Court in the Eastern District of Virginia worked jointly in the Chapter 11 Proceedings, with the District Court reserving jurisdiction over all tort claims, and delegating to the Bankruptcy Court all non-tort matters.

The bankruptcy stay against litigation was extended to all Dalkon Shield Claims, whether or not Robins Co. was included as a defendant. Except for *Breland*, permission by claimants to sue Aetna was uniformly denied because of the interdependent nature of such litigation with the pending Chapter 11 proceedings. *A.H. Robins Co. v. Piccinin,* 788 F.2d 944 (4th Cir.) cert. denied 479 U.S. 876 (1986); *In Re A.H. Robins Co. (Oberg),* 828 F.2d 1023 (4th Cir. 1987), *cert. denied,* 108 S.Ct. 1246 (1988).

Aetna's liability in *Breland* was predicated on various theories including conspiracy with A.H. Robins Co. and others, RICO violations, illegal settlement of insurance coverage litigation as well as theories of negligence, breach of warranty, and strict liability for its alleged participation with A.H. Robins Co. in the marketing of a defective product. Plaintiffs moved for class certification. Aetna supported the motion and stipulated that if a class were certified and if Aetna were found liable on the common issues applicable to all class members, Aetna would agree to be bound by the determinations of causation and the amount of damages that would be assessed in the process of resolving the individual claims against Robins in the bankruptcy proceeding. (146a). On December 29, 1986, the District Court conditionally certified two subclasses ("A" and "B") against Aetna as requested in the plaintiffs' Amended Complaint and Motion For Class Certification. 134a-135a. As modified slightly in the Order of April 12, 1988 which finalized the class ruling, 136a-137a, the subclasses were defined as follows:

> **Class A:** All those individuals who have complied, or are deemed to have complied by the demonstration of excusable neglect, with orders of the Federal District Court for the Eastern District of Virginia governing the filing of proofs of claim [in the Robins Co. Proceedings]

and questionnaires noting the use of the Dalkon Shield.

Class B: All other individuals who may have been eligible to comply with the orders of the Federal District Court for the Eastern District of Virginia but did not do so and are not deemed to have done so.

Extensive discovery was conducted by *Breland* class counsel against Aetna, as described in the Courts' Opinions. 85a-87a, 169a-170a.

To facilitate the establishment of a Plan in the Robins Co. Proceedings, the District Court conducted a lengthy, well structured week-long hearing in November 1987 to estimate the aggregate funds necessary to fully compensate all eligible Dalkon Shield claimants. 21a-22a, 165a. Robins and all Creditors Committees, including the Dalkon Shield Claimants' Committee, as well as all interested parties, including Aetna, were permitted to participate in the hearing and to submit written materials. Subsequent to the hearing, the court determined that the sum of $2.475 billion payable over a reasonable period of time (22a) would be sufficient to fully compensate all present and future Dalkon Shield claims and related expenses.

Following this determination for full payment of tort claimants in the aggregate, Robins conducted merger negotiations with various companies and *Breland* class counsel discussed class settlement possibilities with Aetna. 166a. In February, 1988 American Home Products Co. [AHP] consummated a merger agreement with Robins contemporaneously and interdependent with a *Breland* class settlement agreement. 166a. The Robins/AHP merger agreement which was incorporated as a central feature of the proposed Robins Plan of Reorganization subject to court approval, provided for the creation of a fund in an amount necessary to satisfy the District Court's estimate of $2.475 billion dollars for full

compensation of Dalkon Shield claimants. The Plan also provided for an injunction barring Dalkon Shield claimants from suing certain third parties, e.g. corporate officers, et al., but not including Aetna.

The interdependent *Breland* class settlement provided that Aetna would contribute $425 million in cash and insurance to compensate Class A and Class B members as follows 26a, 151a-152a:

> 1. $75 million dollars to be contributed to the Robins Trust Fund established to fully compensate timely-filed Dalkon Shield Claims [Class A].
>
> 2. $250 million dollars of excess insurance coverage [Primary Excess Policy] to compensate any claims of Class A members over the aggregate Trust amount including interest. Thus this insurance would cover miscalculations by the Trust Administrator in paying out tort claims from a funded Trust that was expected to fully compensate all claims.
>
> 3. $100 million dollars of insurance [two $50 million dollar Outlier Policies] to compensate Class B members.

Because the *Breland* settlement, if approved, would eliminate any class action trial on common issues concerning Aetna's possible joint and several liability, Aetna agreed, and the settlement and Plan further provided with respect to individual claims that Aetna would be bound by the disposition of individual claims of class members pursued and determined through the Claims Resolution Facility ["CRF"] under the Plan. 26a. As part of the options expressly available to eligible class members to resolve individual claims, the CRF assured claimants of rights to a jury trial, with counsel of their own choice, in any appropriate forum of their choice, with all claims and defenses available to both sides. 27a,

73a, CRF Paragraph E 5. The defendant in such trials is required to be the Trust and not Robins or its Successor. (Id.).

After settlements of both *Breland* and the Chapter 11 Proceeding were reached subject to court approval, the court scheduled a class certification argument, a settlement fairness hearing, and a Plan Confirmation hearing. The advocate for objecting parties who vigorously opposed class certification without opt out rights for claimants, explained at argument that he would support the resolution of *Breland* only if claimants were allowed to opt out for a separate jury trial against Aetna where the claimant, after exhaustion of preliminary CRF options, could also join the Trust in jury trial proceedings. Thus, if opt-outs were permitted in the *Breland* settlement for Class A claimants who also had independent rights to pursue full compensation against the Trust, they would be expected to join the Trust to obtain full rights to recover on their claims. 154a-155a. Such routine joinder of the Trust in jury trials by any Class A member opt-outs, if permitted, would naturally result in significant increases of Trust Administrative expenses not contemplated when the court determined what level of Trust funding would be adequate to fully compensate all tort claimants. 155a. On the basis of the unique circumstances presented, the District Court found that the *Breland* settlement class independently satisfied Rule 23(b)(1)(A) and (B) requirements (153a-155a), and certified Class A as a non-optout class, and Class B as an opt-out class for compensatory damages only. 136a-137a. Subsequently, after notice and a fairness hearing, the court "approved the settlement over Petitioners strenuous objections, as to both the absence of an opt out and the adequacy of the settlement. 160a-177a." Pet. 11. The Fourth Circuit affirmed the *Breland* class certification and settlement approval in a

comprehensive opinion (1a-132a) and also affirmed the Plan Confirmation on the same day. 880 F2d 694 (4th Cir. 1989).

Petitioners filed for certiorari review in *Breland* sub nom. Alexia *Anderson* et al, Petitioners, limited solely to the propriety of a non-opt out class for Class A members under Rule 23(b)(1)(A) and due process standards. Many of the same Petitioners among others also filed for certiorari of the Plan Confirmation decision sub nom. Rosemary *Menard-Sanford,* Petitioners, No. 89-441. Petitioners expressly do not seek review of the level of funding of the Trust or the fairness of the Plan which are expressly designed and have been judicially found to fully compensate Dalkon Shield claimants, 84a, (See related Menard-Sanford Certiorari Petition No. 89-441 1-2), or of the amount contributed by Aetna in cash and insurance in the *Breland* settlement to help fund and insure the Trust (Pet. 3, 10), or of the approval of the settlement for Class B members. Pet. 3 n. 1. Nor do Petitioners seek review of the mandatory class certification and settlement approval for the resolution of the insurance coverage settlement controversy in the *Breland* amended complaint (Pet. 6 n. 3) or any other holding of the Fourth Circuit in its affirmance of the approval of the *Breland* Settlement. Pet. 3.

REASONS FOR DENYING THE WRIT

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR REVIEW BY THIS COURT OF THE FOURTH CIRCUIT'S AFFIRMANCE OF THE UNIQUE *BRELAND* ET AL. CLASS SETTLEMENT BETWEEN DALKON SHIELD CLAIMANTS AND AETNA CASUALTY & SURETY CO. IN LITIGATION THAT WAS "INTERDEPENDENT" WITH THE A.H. ROBINS CO. CHAPTER 11 PLAN WHICH, IN TURN, WAS BASED ON THE PREMISE THAT TORT CLAIMANTS WOULD BE FULLY COMPENSATED. NOR IS THERE ANY CONFLICT AMONG CIRCUITS OR WITH DECISIONS OF THIS COURT ARISING FROM PETITIONERS' *HYPOTHETICAL* QUESTIONS PRESENTED FOR REVIEW.

For multiple reasons, the District Court in certifying *Breland* as a class action, approving the class settlement, and confirming the Robins Co. Plan, and the Fourth Circuit in affirming both class decisions as well as the Plan confirmation, recognized that under the unique and complex facts and circumstances involved[2] the settlement of the *Breland* class action was interdependent with the creation and confirmation of an acceptable A.H. Robins Company Reorganization Plan. The Fourth Circuit in reviewing the District Court's exercise of discretion, held that the AHP proposed merger contemplated that a fund of $2.475 million for the full satisfaction of Dalkon Shield claims would be established with "some contribution from Aetna" and it was essential "that the negotiations for settlement of the suit of the *Breland* plaintiffs and of the Claimants' Committee had to be merged into a comprehensive procedure for the liquidation of all Dalkon Shield claims against Robins and Aetna." 24a-25a.

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2. These are not detailed here but are fully summarized in the supporting opinions of the District Court and the Fourth Circuit.

> "It is important to recognize that this case is closely tied in with the bankruptcy of Robins. . . . **The Plan of Reorganization and the *Breland* settlement are interdependent. Failure of approval of either the Plan of Reorganization or the *Breland* settlement would derail hopelessly the carefully negotiated and crafted Plan and Settlement and leave the Dalkon Shield claimants to the vagaries, expenses and delay of further extended litigation."**
>
> 84a-85a (emphasis added)

The District Court similarly ruled that "Aetna's participation is unquestionably an integral aspect of the Debtor's Plan of Reorganization." 145a-146a

Petitioners do not assert that this case poses any special or important reasons for review by this Court, apart from their argument that the affirmance of a non-opt out class purportedly conflicts with circuit and Supreme Court decisions. Nor do petitioners further challenge or seek review of any of the findings or conclusions quoted above. Under all the circumstances, it is manifest that there are no special or important reasons for review by this Court of the unique circumstances under which the courts below have affirmed a class settlement that was expressly found to be interdependent with the Robins Plan.

A. BECAUSE PETITIONERS DO NOT SEEK REVIEW OF FINDINGS THAT (1) ALL CLASS MEMBERS WILL BE FULLY COMPENSATED FROM TRUST FUNDS ESTABLISHED UNDER THE ROBINS CO. PLAN, AND (2) THE AMOUNT PAID BY AETNA IN THE *BRELAND* CLASS SETTLEMENT IS A FAIR AND SIGNIFICANT CONTRIBUTION TO THE FUNDING OF THIS TRUST, PETITIONERS ARE SEEKING REVIEW OF HYPOTHETICAL ISSUES ON BEHALF OF FULLY COMPENSATED CLAIMANTS.

Aetna's contribution of cash and insurance to the Trust Fund, if approved, was described by the District Court as **"an indispensable part** of and will be distributed directly through the Dalkon Shield Claimants' Trust established pursuant to the present Robins' Plan . . . ." 151a (emphasis added). The District Court went on to say that "the Trust will be established and sufficiently funded by contributions by American Home Products and part of the proceeds of the proposed Aetna class settlement in an amount which satisfies the Court will be sufficient to compensate present and future Dalkon Shield claimants." 153a-154a. The Fourth Circuit agreed:

> "The Plan of Reorganization contemplated the creation of a Trust Fund to consist of $2.475 billion, to be funded primarily by payments made by American Home in connection with its acquisition by merger of Robins **and by contributions of Aetna."** 25a-26a (emphasis added)
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> * * *
>
> "The Robins Plan of Reorganization and the *Breland* settlement are intended to provide **full payment** of all compensatory damages suffered by all Dalkon

Shield claimants who have properly filed claims." 84a (emphasis added)

* * *

"Further, the settlement, coupled with that offered in the Robins Reorganization plan, **assured every *Breland* plaintiff of full payment of her proven claim, with an added contingent provision supplied by Aetna to protect against any possible deficiency in the Trust.** 90a-91a (emphasis added)

The sole question raised by Petitioners is whether the certification of a non-opt out class against Aetna for Class A members who will otherwise be fully compensated under the Trust which will be funded and insured in part by Aetna with contributions found sufficient under all the circumstances, nevertheless violates Rule 23 and due process standards. (Pet. 3) Petitioners assert that the ruling affirming such a non-opt out class by the Fourth Circuit conflicts with decisions of other circuits and with those of this Court.

The questions raised are purely hypothetical in light of the unchallenged full compensation that Class A members will receive from the Trust which is funded in significant part by Aetna contributions of cash and insurance that have been found fair and adequate for Class A members in unchallenged findings approving the *Breland* class settlement.[3] In any event, the questions raised present no conflict with decisions of other circuits or with this Court.

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3. Pet. 3: "In the court of appeals petitioners also challenged the validity of the district court's approval of the settlement of this class action, but in this Court they seek only to overturn the rulings precluding them from opting out and proceeding on their own against . . . Aetna. . . ."; Pet. 10: "The size of Aetna's [settlement] contribution is not at issue here."

B. APART FROM THE UNCHALLENGED PROVISION FOR FULL COMPENSATION IN THE CLASS SETTLEMENT AND UNDER THE PLAN, THE QUESTION WHETHER A FEDERAL COURT MAY CERTIFY A NATIONWIDE NON-OPT OUT CLASS OF TORT CLAIMANTS UNDER FED. R. CIV. P. 23(b)(1)(A) (WHICH IS THE ONLY RULE 23(b)(1) PROVISION CHALLENGED BY PETITIONERS ON CERTIORARI) – IS ITSELF ADVISORY IN LIGHT OF THE DISTRICT COURT'S UNCHALLENGED RULE 23(b)(1)(B) CERTIFICATION, AN ISSUE THAT WAS NOT REACHED ON APPEAL. IN ANY EVENT, THE QUESTION OF COMPLIANCE WITH 23(b)(1)(A) AS DECIDED BY THE CIRCUIT COURT, PRESENTS NO CONFLICT AMONG THE CIRCUITS NOR ANY DEPARTURE FROM ACCEPTED PRACTICE.

The District Court certified *Breland* Class A under Rule 23(b)(1). 156a In its Opinion certifying the class, the District Court separately discussed and made different findings to support upholding the class independently under 23(b)(1)(A) and (B). Thus the court, after discussing the individual circumstances involved concluded consistent with (b)(1)(A) criteria that there was a risk of incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others. 153a. Similarly, after discussing other relevant particular circumstances involved, the court concluded independently and consistent with (b)(1)(B) criteria: "Under these circumstances, opt-out rights for Class A members **(apart from creating the likelihood of inconsistent verdicts against Aetna) would severely impede the interests of other class members as a practical matter.**" 153a-155a (emphasis added)

The Fourth Circuit held that the requirements of 23(b)(1)(A) were satisfied and did not reach or discuss

23(b)(1)(B) compliance. If this case were accepted for certiorari, reversal could only occur if neither subsection (A) or (B) of the Rule were satisfied. Because Petitioners only challenge compliance with 23(b)(1)(A) before this Court, that question alone is itself non-dispositive in the absence of consideration of alternative compliance with 23(b)(1)(B) which itself sustains the result below and which Petitioners do not challenge in this Court.

In any event, the District Court held and the Fourth Circuit affirmed the non-opt out *Breland* class because it satisfied 23(b)(1)(A) criteria. The District Court held:

> "A single adjudication is required because all of the claims against Aetna, focus primarily on Aetna's conduct vis-a-vis its relationship with its insured. Multiple adjudications of the identical factual and legal issues thus implicated could yield incompatible standards and conflicting decisions concerning Aetna's role as an insurer to Robins and to others." 153a.

Said the Fourth Circuit in affirming:

> "The theory on which the *Breland* plaintiffs premise this right against Aetna has as its basis that Aetna **went beyond its duty as insurance carrier** for Robins and became an 'active participant in all stages of the development, testing, promoting and marketing of the product [Dalkon Shield]. . . .' [67a-68a]
>
> * * *
>
> "Whether Aetna is liable as a joint tortfeasor in Dalkon Shield litigation will depend on an analysis of a common nucleus of fact that will not vary in the individual cases. . . . Absent class certification, the risk of conflicting decisions on that issue could be anticipated in practically every individual case against Aetna that would be tried. **That threat of**

conflicting legal standards and results could well create a chaotic situation in this case. [68a-69a]

* * *

"[T]he action qualifies under subsection (b)(1)(A) as well as (3). . . . Further, **the resolution of this [overshadowing] issue [of Aetna's liability as a joint tortfeasor], if required to be made in the thousands of individual suits in different courts, would involve the risk of varying and contradictory legal decisions on what was precisely the same factual record. The result would be chaotic. This is a situation which would unquestionably qualify under (b)(1)(A).**" 81a (emphasis added)

Thus, the Fourth Circuit found that the risk of incompatible and contradictory standards as would result here from individual suits in contrast to a unitary adjudication, satisfies 23(b)(1)(A) criteria. This holding is directly in compliance with 23(b)(1)(A) requirements and is fully consistent with decisions of other circuits.

Petitioners misstate the Fourth Circuit's holding as one that affirms a (b)(1)(A) class certification simply on the possibility of Aetna "winning some cases and losing others" (Pet. 11). Based on this misstated holding, Petitioners argue that such possibility of "inconsistent results" has been generally rejected by the other circuits, citing cases. (Pet. 15). On proper analysis of its holdings, the Fourth Circuit is in accord with the generally recognized view that Rule 23(b)(1)(A) is not satisfied when separate adjudications have consequences that some plaintiffs may recover money damages and others may not. Rather, the Fourth Circuit properly focused on the inherent risk of inconsistent and contradictory standards that would result from separate Dalkon Shield suits that would adjudicate Aetna's duties of defense, confidentiality, and loyalty to Robins, its

insured, and to others, in affirming class certification under clear standards of 23(b)(1)(A).

C. SIMILARLY, THE QUESTION – WHETHER THE DENIAL OF OPT-OUT RIGHTS CONFLICTS WITH *SHUTTS* DUE PROCESS REQUIREMENTS FOR CLASS ACTIONS – RAISES AN EXTRANEOUS ISSUE NOT DECIDED BELOW. THE CIRCUIT COURT HELD THAT DUE PROCESS RIGHTS WERE ACTUALLY SATISFIED FOR CLASS MEMBERS IN THE NON-OPT OUT CLASS BECAUSE THEY STILL RETAINED THE RIGHT TO HAVE JURY TRIALS, WITH THEIR OWN LAWYERS, IN THE APPROPRIATE FORUM OF THEIR CHOICE FOR THE ADJUDICATION OF THEIR INDIVIDUAL CLAIMS TO RECOVER FULL COMPENSATION. MOREOVER, EVEN THE QUESTION RAISED (WHICH WAS BASED ON ERRONEOUS PREMISES THAT CLAIMANTS LOST THEIR RIGHTS TO CHOOSE THEIR OWN LAWYER AND FORUM TO LITIGATE INDIVIDUAL CLAIMS) PRESENTS NO CONFLICT WITH DUE PROCESS DECISIONS OF THIS COURT.

In response to Petitioners' argument that *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) "proscribes any class certification, which does not provide the class members with the right to opt out" (74a), the Fourth Circuit held, that even if *Shutts* required opt-out rights in order to satisfy due process standards in all class actions, all of the due process standards that are afforded by opt-out rights are, in fact, actually afforded in the class certified here, despite the absence of formal opt-out rights which would not afford any additional due process rights. Thus, the Circuit Court concluded in the unique circumstances involved, that however the requirements of *Shutts* might be applied in this case, they were satisfied. Said the Fourth Circuit:

> "Fortunately, however, ***Shutts*** – **if taken as requiring an opt-out provision in any class certification,** and assuming without deciding, that opt-outs could not be validated here under the *Mathews v. Eldridge* standard – **is satisfied in this case.** . . . In this case the Trust created by the parties for the resolution of all Class A claims on individual causation and damages does not in express terms include an opt-out provision, but in effect it does. **The Plan gives every such class member the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.**
>
> * * *
>
> "Certainly, the procedure provided every class member here fairly meets the standard of 'fundamental fairness' which due process demands. It follows that *Shutts,* if applicable, is fully complied with in this case." 75a-76a (emphasis added)

In essence the Fourth Circuit recognized that while the unique class settlement in combination with the Plan fairly resolved aggregate compensation of all claims without opt-out rights for Class A members, the procedures for resolving individual recovery allocations of this sufficiently large Trust included every due process protection afforded to individual litigants.

Because the Fourth Circuit assumed without deciding *Shutts'* applicability to this case but held, rather, that the non-opt out class certified below satisfied actual due process standards as they applied to the myriad of unique circumstances involved here, Petitioners' question whether *Shutts'* due process requirements were violated by the absence of opt-out rights for Class A members is an extraneous one at best.

The primary grounds set forth by Petitioners in support of their argument that due process standards were violated because of the absence of opt-out rights are based on a misperception of the procedures afforded to Class A members in the adjudication of their individual claims under the Plan. Thus, Petitioners' bemoan the fact that Class A members are forced to give up personal adjudication of individual claims because they will be represented by class counsel (rather than counsel of their own choice) who will adjudicate their individual claims on a class basis, and they are forced to litigate in the Eastern District of Virginia rather than in a forum of their own choice. Petitioners' Questions Presented, No. 2, Pet. i, and 22, 23. Such alleged deprivation of rights is directly contrary to the rights preserved in the Claim Resolution Facility procedures and guaranteed to all claimants in their individual claims, namely the right to have a jury trial in any appropriate forum and with counsel of the claimant's choice. 27a, 73a. Because these central due process rights are erroneously perceived by Petitioners to be forfeited under the class certification and settlement decisions, Petitioners' due process objections generally disappear when the true circumstances are recognized.

II. THE HOLDINGS OF THE FOURTH CIRCUIT THAT THE CERTIFIED CLASS SATISFIED PROCEDURAL AND DUE PROCESS STANDARDS WERE BASED EXCLUSIVELY ON FACTUAL CONSIDERATIONS. PETITIONERS' EFFORTS IN SEEKING ADVISORY OPINIONS ON HYPOTHETICAL OR NON-DISPOSITIVE QUESTIONS SERVES ONLY TO PROTRACT THE RESOLUTION OF THE CLAIMS OF THE CLASS (THE VAST MAJORITY OF WHOM SUPPORTED THE CLASS SETTLEMENT, VOTED IN FAVOR OF THE INTERDEPENDENT ROBINS CO. PLAN, AND ARE AWAITING COMPENSATION), AND UNDULY BURDENS THE PARTIES AND THIS COURT.

In affirming the class certification, settlement approval, and the Plan Confirmation, the Fourth Circuit scrupulously reviewed the applicability of recognized legal standards to the highly unique facts and circumstances underlying the resolution of all present and future Dalkon Shield claims. Further review of these fact-specific rulings is inappropriate, because any ensuing precedent would probably be limited to the facts involved in the instant case.

Having chosen not to further challenge the estimation hearing procedures or the sufficiency findings related to the Trust fund being established to fully compensate all tort claimants, and having chosen not to seek further review of the class settlement approval or of the adequacy of the amount being paid by Aetna in the class settlement, Petitioners raise only hypothetical questions in their certiorari petition. This Court has held that it does not decide abstract hypothetical or contingent questions, or constitutional questions before they need to be decided. *Thorpe v. Housing Authority of City of Durham, N.C.*, 383 U.S. 268 (1969) quoting *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Rice v. Sioux City Memorial Park Cemetery,*

349 U.S. 70 (1955). Yet that is precisely what Petitioners seek from this Court. Petitioners' contentions are seeking advisory review by this Court. In contrast, the Plan and class settlement provide unique benefits to the class not available in individual litigation, e.g. waiver of individual issues by Aetna relating to causation, extent of injuries, and amount of damages recoverable, together with generously afforded and sufficient due process protections in the CRF procedures for the resolution of individual claims. *Breland* class members overwhelmingly supported approval of the class settlement and have been awaiting compensation for a period spanning more than four years. Petitioners' pursuit of largely hypothetical questions not suitable for certiorari review serves, as a practical matter, unduly to delay proceedings and burden the Court and the parties.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 89-442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALEXIA ANDERSON, *et al.*,
Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et. al.*,
Respondents.

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1. Perhaps the most noteworthy element of the oppositions submitted by respondents Aetna Casualty and Surety Company ("Aetna") and plaintiffs Gloria Breland, *et al.* ("Breland"), is what they do not say. Like the court of appeals, they discuss at great length the interrelation between the settlement of this action and the A.H. Robins reorganization plan, including the requirement that the district court — but no other court — approve the settlement and grant mandatory class certification. However, unlike the court of appeals, respondents do not contend that the Robins reorganization plan cannot be consummated if the decision below is set aside. Since that misapprehension was the linchpin of the ruling below, respondents' silent concession directly undermines the decision of the Fourth Circuit.

2. On the Rule 23 issue, respondents essentially concede that the question presented by the petition is worthy of review by this Court, but they assert that the Court should decline to hear the case because petitioners have misread the decision below and misunderstood the facts of this case. According to respondents, this is not an ordinary case for money damages, but a case involving an insurance company whose defense is that it was simply fulfilling its duty to protect its insured. Therefore, according to Aetna, the possibility that it may be held liable for substantial money damages in some states, because it wrongfully took certain actions that it claims it was required to take in other states, is the kind of intolerable conflict that meets the "incompatible standards" test of Rule 23(b)(1)(A).

The first difficulty that respondents face is that the court of appeals made no such ruling in upholding class certification. In fact, its lengthy opinion contains not a word to support the theory set forth in respondents' oppositions. While the district court appeared to make a finding along that line, the court of appeals failed to do so, as is apparent from the contrasting rationales contained in the quotes set forth on pages 12 and 13 of the Breland opposition. Moreover, if the court of appeals thought

that this case involved a situation in which an insurance company was potentially being told to follow one rule by one state, and another rule by another, it would have been entirely unnecessary for the court to review the history of class action litigation since the 1966 amendments and to criticize and attempt to distinguish the other mass tort cases. Indeed, under the theory offered by respondents, none of those cases would be relevant at all. Thus, it is apparent that the court of appeals did not affirm the ruling below on the theory suggested by respondents here.[1]

It is hardly surprising that the court below did not rest on that theory, since this was not a typical case under Rule 23(b)(1)(A) where a plaintiff is seeking an injunction, for example, requiring a stakeholder to pay money to one group of claimants, and not to another, where varying determinations would be intolerable. While it is possible that some cases seeking only damages might qualify under Rule 23(b)(1)(A), because of the impact that the decision would have on the future conduct of the defendant, that is surely not the case here. Thus, as the court of appeals recognized (66a), this case involves a series of events that are so unique in product liability litigation that one can fairly assume that they will never be repeated, and surely not by Aetna.

Moreover, this is a case seeking damages for Aetna's past misconduct, not an action seeking to control Aetna's future conduct toward other insureds or their tort victims. To the extent that Aetna's past misconduct might be judged differently according to the laws of the various states — thereby creating varying incentives by which Aetna and other insurers might guide their future behavior — those differences in outcomes are simply an inevitable result of our system of federalism. Nothing

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[1] Contrary to Aetna's assertion at the top of page 20 of its opposition, neither reference (70a, 81a) embraces the rationale advocated by respondents here.

in Rule 23 was intended to preempt the federal system on which this Nation was formed, nor to mandate a uniform federal law of products liability or to impose a uniform duty on insurers. Until this case, no one ever has suggested such a profoundly substantive role for the procedural mechanisms of Rule 23.

There is another very strong reason why the rationale offered by respondents cannot apply in this case. Paragraphs 35 and 36 of the third amended complaint contain allegations of criminal activity, including obstruction of justice, fraud, destruction of evidence, and subornation of perjury, which, for purposes of class certification, must be assumed to be true. Thus, even if Rule 23(b)(1)(A) could be used where an insurance company feared liability from its insured for making disclosures, and at the same time feared liability from third parties for not doing so, there is no authority under which an insurance company could be held liable to its insured for what Aetna allegedly did here: commit criminal acts. Not surprisingly, that portion of the amended complaint received no mention in the briefs in opposition, nor in the class certification rulings by the district court, and only a passing reference at the end of the opinion of the court of appeals.

There is another aspect of this case that undermines respondents' characterization of the class certification ruling. Their theory might explain why a d*efendant* would seek class certification in order to prevent the possibility of being "whipsawed" by conflicting rulings in different jurisdictions. But in this case, class certification was initially sought by the *plaintiffs* in their complaint, and it is obvious that, if avoiding being whipsawed is the reason why Aetna wanted class certification, plaintiffs would have had a powerful incentive to take the opposite stance, which they did not do.

Finally, even if the court of appeals had acted on the basis now relied on by respondents, that would hardly justify denying *certiorari*. At the very least, turning what appears to be an

ordinary damages action into a Rule 23(b)(1)(A) class action is a novel extension of the law, whose potential for fundamentally altering Rule 23 would itself provide a basis for granting review, especially since respondents' theory appears to have no limitations or even any guidelines for determining what kinds of possible conflicts in state substantive law would bring Rule 23(b)(1)(A) into play. Accordingly, respondents' principal defense of the ruling below does not form a basis for denial of *certiorari*.

3. Respondents also note that the complaint and arguably the district court relied on Rule 23(b)(1)(B) for mandatory certification. However, as recognized by respondents, the court of appeals did not uphold certification on that basis, and while petitioners do not object to respondents defending the judgment below on that ground, even in the absence of a cross-petition for *certiorari*, they are confident that it, too, cannot be a basis for upholding class certification.

While the district court mentioned Rule 23(b)(1)(B) in its discussion, it was only in the portion of its memorandum dealing with the insurance coverage issue (150a). Subsection (B) was never mentioned in either certification order (134a-137a), and the district court never explained how that subsection applied or on what theory it is relevant to this case. Surely, the justification advanced by respondents — that various members of the plaintiff class will be prejudiced if the settlement falls through — cannot be a proper basis for invoking subsection (B) because that would apply every time some plaintiffs wanted to settle and others did not. Whatever the limits of Rule 23(b)(1)(B) and its possible application to a limited fund, this case does not bring them into play. Thus, this reason offered for denying *certiorari* should also be rejected.

4. Much of respondents' opposition on the Due Process question is tied in with their views on Rule 23. In addition, they continue to insist that petitioners will have their full right to trial

by jury and that is all that the Due Process Clause requires. They are able to make that contention only because they continue to overlook petitioners' basic assertion that they have the right to try the merits of the liability case against Aetna. That would include obtaining a judgment for punitive damages if Aetna is found to have engaged in criminal misconduct, and the right to not be forced to accept an inadequate amount in settlement, in a case brought by others, in a forum not of petitioners' choosing.

5. Respondent Aetna also attempts to distinguish *Phillips Petroleum Corp. v Shutts*, 472 U.S. 797 (1985), on the ground that it applies only to state courts, without any explanation of why the same phrase in two amendments to the Constitution should have different meanings. Yet the only limitations announced by this Court on its holding in *Shutts* that due process requires, *at a minimum*, that individual class members be afforded the right to opt out, is that the rule applies to actions primarily seeking monetary relief. 472 U.S. at 811, n.3. But even if there were a difference between federal and state actions, an opt out would still be required for the reasons set forth on page 23 of our petition. Therefore, no matter how respondents squirm, they cannot avoid the conclusion that this is an action for money damages for which an opt out is consitutionally required.

6. The only other basis offered for denying *certiorari* on the Due Process and the Rule 23 issues is respondents' claim that petitioners will be paid in full, and hence their objections are purely theoretical. But as we explained in both the original petition in this case and the petition in *Rosemary Menard-Sanford v. A.H. Robins Co.*, No. 89-441, and again in the reply brief in that case, there is no guarantee of full payment, and the fact that the district court made a finding that there would be sufficient money in the fund does not erase petitioners' substantial doubts about the adequacy of the funding. Indeed, if there were a guarantee, both cases would long ago have been resolved, and we would not be before the Court seeking *certiorari*.

* * *

For the foregoing reasons and those set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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